

# TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 232.

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PAUL CHARLTON, AS THE NEXT FRIEND OF PORTER  
CHARLTON, APPELLANT,

JAMES J. KELLY, SHERIFF OF HUDSON COUNTY, STATE  
OF NEW JERSEY, AND GUSTAVO DE ROSA, VICE-CON-  
SUL OF THE KINGDOM OF ITALY IN THE UNITED  
STATES OF AMERICA.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF NEW JERSEY.

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FILED MARION E. DELL.

(22,551)

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## 1 United States Circuit Court, District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceedings, Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy.

*Copy Docket Entries.*

- 1910, December 10. Petition for Writ of Habeas Corpus and Writ of Certiorari filed.
- " " " Writ of Habeas Corpus allowed and issued.
- " " " Writ of Certiorari allowed and issued.
- " " " Order to give notice filed.
- " " 12. Writ of certiorari returned, served and filed.
- " " " Writ of habeas corpus returned, served and filed.
- " " 14. Writ of certiorari, returned served and filed.
- " " 19. Return to Writ of Habeas Corpus filed.
- " " 18. Copy of Requisition made by Italian Government filed.
- " " 19. Return to Writ of Certiorari filed.
- " " " Hearing. Continued to January 9, 1911.
- " " " Certified copy of Transcript of Proceedings before Hon. John A. Blair filed.
- " " " Order remanding petitioner filed.
- " " 27. Affidavit on motions of petitioner filed.
- " " 28. Petition of Consul General for Italian Government for Writ of Certiorari filed.
- " " " Writ of Certiorari issued.
- " " 30. Order on Motions against returns of writs filed.
- 1911, January 4. Order requesting Secretary of State to furnish facts and documents filed.
- " " " Return to Writ of Certiorari filed.
- " " 9. Service of Order of January 4, 1911, filed.
- " " 14. Writ of Certiorari returned served and filed.
- " " 12. Copy of correspondence between Secretary of State and R. Floyd Clarke filed.
- " " " Copy of correspondence between Secretary of State and Italian Government filed.
- " " 23. Hearing on Writ of Habeas Corpus. Writ discharged.
- " " " Final order dismissing writ of habeas corpus &c.
- " " " Oral statement by Court at end of argument filed.

- 1911, January 30. Assignment of Errors filed.  
 " " " Petition of Appeal filed.  
 " " " Order allowing appeal filed.  
 " " " Bond on Appeal filed.  
 " " " Certificate filed.  
 " February 14. Citation returned, service acknowledged, and copy filed.  
 " " " Letter from Judge Rellstab to R. Floyd Clarke filed.

### 3 United States Circuit Court for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceedings, Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

To the Circuit Court of the United States:

The Petition of Paul Charlton respectfully shows:

First. That your petitioner is the father and next friend of Porter Charlton, who is a citizen of the United States and is imprisoned and restrained of his liberty in the County Jail of the County of Hudson, State of New Jersey, in the City and State of New Jersey, by James J. Kelly, Sheriff of Hudson County, State of New Jersey, and that the said Porter Charlton is so restrained and confined in the County Jail in the City of Jersey City in said County of Hudson and State of New Jersey, and is in the custody of the said Kelly, Sheriff of Hudson County, New Jersey, by virtue of a warrant dated October 14, 1910, issued by the Hon. John A. Blair, a Judge of the Court of Oyer and Terminer of Hudson County, New Jersey, sitting as a committing magistrate and acting therein under the authority conferred upon him by the Act of Congress approved August 12, 1848, concerning the extradition of fugitives from a foreign Government under a treaty or convention between this and any foreign government, and the acts amending and supplementing the same, in the proceeding entitled "Hudson County Court of Oyer and Terminer. In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States of America and the Kingdom of Italy, a copy of which warrant is hereto attached and marked Exhibit A."

Second. That the true cause or pretense of such confinement, imprisonment, detention and restraint, according to the best knowledge of your petitioner, is as follows, namely: that on the 24th day of June, 1910, before the Hon. John A. Blair, one of the Judges of Hudson County Court of Oyer and Terminer, a court of superior jurisdiction, sitting as a United States Magistrate under Sec. 5270 of the United States Revised Statutes, a complaint was filed by the

Hon. Gustavo De Rosa, Vice Consul for the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, charging Porter Charlton with the commission of the murder of his wife, Mary Scott Castle Charlton, at Maltrasio, Italy, on or about the 7th day of June, 1910, and as being a fugitive from justice in this country, and demanding a warrant and commitment under the United States Revised Statutes, and thereupon, on the 24th day of June, 1910, said Porter Charlton was arrested on the foregoing charge and was committed to the Hudson County Jail by order of the Court to the end that the evidence of his criminality might be heard and considered, pursuant to the statute. That said Charlton has since been in said prison, and that adjournments have been taken from June 24th, 1910, to September 21, 1910, when a hearing was had on said complaint, and thereupon, on the 14th day of October, 1910, a decision was made by the  
5 said Judge, and thereupon said Judge issued his warrant as aforesaid, for the commission of said Porter Charlton so charged, to the said County Jail, in the custody of James J. Kelly, in Jersey City, there to remain until the surrender of the said prisoner should be made pursuant to the Act of Congress in such case made and provided.

Third. That the said imprisonment, detention and confinement and restraint of said son of your petitioner are illegal, as your petitioner is advised by his counsel, R. Floyd Clarke, Esq., whose office is at Room 1204, No. 37 Wall Street, Borough of Manhattan, New York City, and as your petitioner verily believes, and that the illegality thereof consists in the following matters, to wit:

1. That on the hearing before the said Magistrate there was no legal proof of the commission of any crime or any proof on which reasonable cause could be predicated of the commission of any crime by said son of your petitioner, in that certain documents which were admitted against the objection and protest of your petitioner and his said son were not and are not duly authenticated under the statutes in such case made and provided so as to be entitled to be used in evidence in the proceeding aforesaid, and thereby the said Court had no jurisdiction under the statute and treaty in such case made and provided.

2. That at the time of the hearing of the matter of the extradition of Porter Charlton, before the Judge of the Court of Oyer and Terminer of Hudson County, New Jersey, sitting as a Federal Examining Magistrate under Acts of Congress, certain witnesses, qualified by age, knowledge and experience, physically present in court, were offered to be sworn on behalf of the accused, for the purpose of proving that the accused was insane on the date  
6 when the crime was alleged to have been committed, on the date of said hearing, to wit, September 21, 1910, and said Judge, so sitting refused to allow said witnesses to be sworn, or any evidence as to the insanity of the accused at the time of the commission of the crime, or at the date of the hearing, to be introduced, and such insanity is the reason why this petition is signed by your petitioner instead of said son.



3. That at the time of the hearing of the matter of the extradition of Porter Charlton before the Judge of the Court of Oyer and Terminer of Hudson County, New Jersey, sitting as a Federal Examining Magistrate under the acts of Congress as aforesaid, the following facts were proved, namely:

A. That the said son of your petitioner was and had been since the first day of January, 1900, a citizen of the United States of America.

B. That it is provided in Article IV of the Amendments to the Constitution of the United States that

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated."

And by Article V—

"That no person shall be held to answer for a capital or otherwise infamous crime unless on presentation or indictment of a Grand Jury \* \* \* nor be deprived of life, liberty or property without due process of law."

C. That under Section 2 of Article II of the Constitution of the United States the treaty-making power is lodged in the President of the United States by and with the concurrence of two-thirds of the Senators of the United States present when such treaty is presented for consideration.

7 D. That pursuant to the authority so conferred, there was proclaimed between the Government of the United States and the Kingdom of Italy a Convention of Extradition, upon September 30, 1868, which provided (Article I) for the mutual delivery of "persons" who, having committed crime in territory within the jurisdiction of the demanding government, shall have sought asylum within territory under the jurisdiction of the other, and further provided (Article II) that among the crimes for which such persons shall be mutually delivered up was the crime of murder; it was further provided (Article V) that upon proper application by the diplomatic representatives of the Kingdom of Italy in the United States, or a designated agent, that the President of the United States or the proper official of the Kingdom of Italy should issue his mandate or warrant, through the Department of State, for the apprehension of the alleged fugitive from Justice. A copy of said treaty in full is hereto attached and made a part hereof, and marked Exhibit B.

E. Upon April 24, 1885, there was proclaimed a convention between the Government of the United States and the Kingdom of Italy additional to the extradition convention of 1868 (*supra*), which provided, *inter alia*, (Article II, additional to Article V of the Convention of 1868) that, after the arrest of the alleged fugitive:—  
 " \* \* \* the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence. \* \* \* :  
 if, however, the requisition together with the documents above provided for, shall not be made, as required, by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days from

the date of the arrest of the accused, the prisoner shall be set at liberty."

A copy of the additional Convention of 1885 is hereto annexed and made a part hereof and marked "Exhibit C."

F. That subsequent to April 24, 1885, and prior to January 1, 1890, frequent demands were made by the Government of the United States upon the Government of Italy for the extradition of subjects of Italy, fugitive from the justice of the United States, in asylum in territory under the jurisdiction of the government of Italy, on the ground that by the true construction of said treaty citizens of the asylum country were included in the word "persons" as used in its first article, and such demands were refused by the Kingdom of Italy on the ground that by the true construction of said treaty citizens of the asylum country were not included in the word "persons" as used in the first article thereof, and that it was against the public policy of the Government of Italy, as construed by its political authorities, to surrender its citizens on extradition. On January 1, 1890, after enactment by the parliament of Italy, there was put into effect within the Kingdom of Italy, by Royal Decree of the King of Italy, a Penal Code for the Kingdom of Italy, Article 9 of which provided as follows:

"9. The extradition of a citizen is forbidden."

G. The Government of the United States, through its Executive and political officials, acquiesced in the construction placed by the political and legislative department of the Kingdom of Italy upon the word "persons", contained in the Conventions of Extradition in force, as not including citizens of Italy, fugitive from the justice of the United States, in asylum in Italy, and on requests made by Governors of States of the United States for demand for extradition of Italian citizens, so fugitive and in asylum, refused to make any such demand and took no further action thereon.

H. That, in consequence of the political construction placed upon said treaty by the political authorities of the Kingdom of Italy and of the prohibition, in contravention of the provisions of said extradition, treaties, by the supreme legislative authority of the Kingdom of Italy, the said Extradition Convention of 1868, and the additional convention of 1885, were denounced and annulled, in so far as the same applied reciprocally, to citizens of either country, fugitive from the Justice of the other, in asylum in the country of which they were citizens or subjects, while as to all other "persons" than "citizens" of either, said Extradition Conventions remained, and are now in force, but that as to citizens of either country, no Convention of Extradition has been in existence since prior to January 1, 1890.

I. That against the denouncement and annulment of said Extradition Conventions by the foregoing political and legislative action of the Kingdom of Italy, and a breach of the mutual engagement therein contained by the political and legislative action of the Kingdom of Italy, the United States has not sought either of the two remedies open to it under public law, to wit:

It has neither declared war, nor demanded arbitration in consequence thereof, but has acquiesced therein as aforesaid.

Fourth. That the said Porter Charlton was arrested  
10 within the jurisdiction of the Government of the United States, namely, in Hudson County, State of New Jersey, on June 23, 1910, and thereafter and on the 24th day of June, 1910, was committed to prison under the preliminary warrant for his apprehension, that he might be brought before the Judge to the end that the evidence of his criminality might be heard and considered, and was thereupon committed to the Hudson County Jail on said 24th day of June, 1910, into the custody of the said Sheriff as aforesaid, and has remained so imprisoned ever since.

Fifth. That no documents were presented either to the Department of State of the United States, or to the Court of Oyer and Terminer of Hudson County, New Jersey, sitting under the provisions of the Acts of Congress in that behalf made and provided as a Federal examining Magistrate in said extradition matter as aforesaid, within forty days, as provided in said extradition convention and the addition thereto, and said documents when presented on August 11, 1910, more than forty days after the arrest of the said Porter Charlton, as aforesaid, were neither accompanied by the formal demand of the Government of Italy for the extradition of Porter Charlton nor were the documents so presented authenticated, identified and offered in the manner provided by said Convention and addition thereto, and the statutes in such case made and provided.

Sixth. That the requisition for the surrender of the said Porter Charlton alleged to be a fugitive from justice, made by the Kingdom of Italy, as aforesaid, on which the certificate or mandate of the

Secretary of State in this proceeding was issued, was a requisition  
11 without any accompanying documents, as provided in the second paragraph of Article V as amended and supplemented by the 1884 Convention additional to the extradition Convention between the United States and Italy, of 1868.

Seventh. That your petitioner and his said son, have duly objected to the continuance of any proceedings in extradition under the said complaint and warrant as aforesaid before the said Judge of the Court of Oyer & Terminer of Hudson County, New Jersey, sitting under the provisions of the Act of Congress in that behalf made and provided as a Federal Examining Magistrate in extradition matters, on the ground that the said Judge had no authority or jurisdiction in the premises to proceed therewith on the grounds aforesaid, or under any provisions of the Constitution or laws of the United States or any treaty of the United States with any foreign country, and have demanded that said proceedings be dismissed, and that said objections have been overruled by the said Judge sitting as a Federal Examining Magistrate in extradition matters as aforesaid, and said Judge has made a decision therein as aforesaid, and your petitioner and his said son have duly filed exceptions thereto.

Eighth. That thereafter and on or about the 3rd day of November, 1910, the said Hon. John A. Blair, sitting as Committing Magistrate as aforesaid, certified his decision, together with a copy of

all the testimony taken before him, to the Hon. the Secretary of State of the United States of America, and thereafter, your petitioner and his said son having duly objected to the continuance of said proceedings upon all the grounds stated herein as herein expressed,

the said objections were overruled by the said Secretary of State on or about the 9 day of December, 1910, and the said

Secretary of State has issued or is about to issue his warrant for the surrender of the said Porter Charlton so committed to be delivered to such person as shall be authorized in the name of and on behalf of the Italian Government, under the provisions of Section 5272 of the Revised Statutes of the United States, to all of which your petitioner and his said son have objected and duly excepted.

Ninth. That the cause or pretense of the imprisonment and restraint of said son of your petitioner is that a charge has been made against him as aforesaid and the decision of the Commissioner as aforesaid and his warrant issued thereon for the commitment of said son of your petitioner as so charged to the Hudson County Jail, there to remain until such surrender should be made pursuant to the Extradition Act and Treaty in such case made and provided, and also the said warrant for his surrender issued or to be issued as aforesaid by the Secretary of State of the United States of America pursuant to Section 5272 of the Revised Statutes of the United States.

Tenth. That your petitioner and his said son are informed by his counsel, as aforesaid, and verily believe, that said imprisonment and detention as aforesaid is illegal, and that the aforesaid warrant for the commitment of said son of your petitioner as so charged to the jail of Hudson County, there to remain until his surrender shall be made pursuant to the Extradition Act and Treaty, and also that the aforesaid warrant for the surrender of said son of your petitioner under Section 5272 of the Revised Statutes of the United States is wholly void. That on the hearing before the said Magistrate, as also on the hearing before the said Secretary of

State, no evidence was presented of any jurisdictional facts to warrant his imprisonment and detention. That the denial to him of the right to have said proceedings dismissed constitutes a violation of the Fourth and Fifth Amendments to the Constitution of the United States and of the common law of the United States of America, and constitutes a deprivation of said son of your petitioner's liberty without due process of law.

Eleventh. Your petitioner is further informed by his said counsel, as aforesaid, and verily believes, that the said imprisonment and detention as aforesaid is illegal by reason of the foregoing matters alleged, and that the case involves a construction or application of the constitution of the United States, and is a case in which the validity and construction of a treaty made between the United States and a foreign government is drawn in question.

Wherefore your petitioner prays that writs of habeas corpus and certiorari may be made and issued, directed to the persons having the son of your petitioner in custody, commanding them to bring and have the body of the said Porter Charlton before this court at

a time and place therein to be specified, to do and receive what shall then and there be considered by this court concerning said Porter Charlton, together with the time and cause of the detention of the said Porter Charlton, and that a writ of certiorari issue, directed to the said Hon. John A. Blair, Judge of the Court of Oyer & Terminer, of Hudson County, New Jersey, sitting as a Federal Examining Magistrate in Extradition matters as aforesaid, and also directed to the said The Hon. P. C. Knox, Secretary of State of the

United States of America, commanding him and them to  
 14 certify before this Honorable Court the day and cause of your petitioner's son's imprisonment, and a transcript of all proceedings against the son of your petitioner on which the said Porter Charlton is detained, for such action thereon as may be proper in the premises.

Dated the 9th day of December, 1910.

PAUL CHARLTON,  
*Petitioner.*  
 R. FLOYD CLARKE,  
*Attorney for Petitioner.*

Office & Post Office Address, 37 Wall Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,

*District of New Jersey, County of Hudson, ss:*

Paul Charlton, being duly sworn, deposes and says, that he has read the foregoing petition and knows the contents thereof, and that the same is in all respects true.

PAUL CHARLTON.

Subscribed and sworn to before me this ninth day of December, 1910.

[L. s.]

FREDERICK W. RITTER,  
*Notary Public of New Jersey.*

15

EXHIBIT A.

Hudson Court of Oyer and Terminer.

In the Matter of the Application for the Extradition of PORTER CHARLTON under the Treaty Between the United States of America and the Kingdom of Italy.

HUDSON COUNTY, ss:

The State of New Jersey to the Sheriff and Constables of the County of Hudson:

We command you that you take the body of Porter Charlton, against whom a complaint is made under oath, charging said Porter Charlton, being found within the limits of the State of New Jersey, with having, on or about the 7th day of June, A. D. 1910, at Mol-

trason, in the Kingdom of Italy, committed the crime of murder upon his wife, Mary Charlton, within the jurisdiction of the Kingdom of Italy, and evidence of criminality having been heard before me and by me considered; and upon the said hearing, sufficient evidence having been presented to sustain the charge, under the provisions of a certain treaty between the Governments of the United States of America and of the Kingdom of Italy; and you are commanded him to convey to the keeper of the Common Gaol of the said County of Hudson, who is hereby required him safely to keep until he shall be surrendered to the Kingdom of Italy, under warrant from the Government of the United States, or until he be thence discharged by due course of law.

16      Witness Honorable John A. Blair, one of the Justices  
of the Court of Common Pleas, in and for the County of  
Hudson, and in the absence of a Justice of the Supreme  
Court, sitting in and holding said Court of Oyer and Terminer on  
the 15th day of October, 1910.

17 ЕХНІВІТ В.

### Extradition Convention.

Concluded March 23, 1868; ratification advised with an amendment by the Senate June 17, 1868; ratified by the President June 22, 1868; ratifications exchanged September 17, 1868; proclaimed September 30, 1868. (Treaties and Conventions, 1889, p. 578.)

## Articles.

- I. Delivery of Accused.
- II. Extraditable Crimes.
- III. Political Offenses.
- IV. Persons Under Arrest.
- V. Procedure.
- VI. Expenses.
- VII. Duration; ratification.

The United States of America and His Majesty the King of Italy, having adjudged it expedient, with a view to the better administration of Justice, and to the prevention of crimes within their respective territories and jurisdiction that persons convicted of or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a Convention for that purpose, and have appointed as their Plenipotentiaries:

The President of the United States, William H. Seward, Secretary of State. His Majesty the King of Italy, the Commander Marcello Cerruti, Envoy Extraordinary and Minister Plenipotentiary who, after reciprocal communication of their full powers, found in good and due form, have agreed upon the following articles, to wit:



## Article I.

The Government of the United States and the Government of Italy, mutually agree to deliver up persons who, having been convicted of or charged with, the crimes specified in the following article, committed within the jurisdiction of one of the

18 contracting parties, shall seek an asylum, or be found within the territories of the other; Provided, that this shall only be done upon such evidence of criminality, as, according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension, and commitment for trial, if the crime had been there committed.

Article II. <sup>(1)</sup>

Persons shall be delivered up, who shall have been convicted of, or be charged, according to the provisions of this Convention, with any of the following crimes:

I. Murder, comprehending the crimes designated in the Italian Penal Code, by the terms of parricide, assassination, poisoning and infanticide.

II. The attempt to commit murder.

III. The crimes of rape, arson, piracy and mutiny on board a ship, whenever the crew or part thereof by fraud or violence against the commander, have taken possession of the vessel.

IV. The crime of burglary, defined to be the action of breaking and entering by night into the house of another with the intent to commit felony, and the crime of robbery, defined to be the action of feloniously and forcibly taking from the person of another, goods or money, by violence or putting him in fear.

V. The crime of forgery, by which it is understood the utterance of forged papers, the counterfeiting of public, sovereign or government acts.

19 VI. The fabrication or circulation of counterfeit money, either coin or paper, of public bonds, bank notes and obligations, and in general of any title and instrument of credit whatsoever, the counterfeiting of seals, dies, stamps and marks of State and public administrations and the utterance thereof,

VII. The embezzlement of public moneys committed within the jurisdiction of either party, by public officers or depositors.

VIII. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when these crimes are subject to infamous punishment. <sup>(2)</sup>

## Article III.

The provisions of this treaty shall not apply to any crime or offense of a political character, and the person or persons delivered up for the crimes enumerated in the preceding article shall in no

<sup>(1)</sup> See Convention of 1884, p. 324.

<sup>(2)</sup> See Convention of 1868, p. 309.



case be tried for any ordinary crime committed previously to that for which his or their surrender is asked.

#### Article IV.

If the person whose surrender may be claimed pursuant to the stipulations of the present treaty, shall have been arrested for the commission of offenses in the country where he has sought asylum, or shall have been convicted thereof, his extradition may be deferred, until he shall have been acquitted, or have served the term of imprisonment to which he may have been sentenced.

#### Article V.

Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or in the event of the absence of these from the country, or its seat of Government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the Court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the Judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of Italy, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper Executive Authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms in such cases.

#### Article VI.

The expenses of the arrest, detention and transportation of the persons claimed, shall be paid by the Government in whose name the requisition shall have been made.

#### Article VII.

This Convention shall continue in force during five (5) years from the day of exchange of ratifications, but if neither party shall have given to the other six (6) months' previous notice of its intention to terminate the same, the Convention shall remain in force five years longer, and so on.

The present Convention shall be ratified, and the ratifications exchanged at Washington, within six (6) months, and sooner, if possible.

In witness whereof, the respective plenipotentiaries have signed the present Convention in duplicate, and have thereunto affixed their seals.

Done at Washington, the twenty-third day of March, A. D. one thousand eight hundred and sixty-eight, and of the Independence of the United States the ninety-second.

[SEAL.]

[SEAL.]

WILLIAM H. SEWARD.  
CERRUTI.

*Convention Additional to Extradition Convention, 1868.*

Concluded June 11, 1884; ratification advised by the Senate July 5, 1884; ratified by the President April 10, 1885; ratifications exchanged April 24, 1885; proclaimed April 24, 1885. (Treaties and Conventions, 1889, p. 595.)

Articles.

- I. Kidnapping added to extraditable crimes.
- II. Preliminary Detention.
- III. Effect; ratification.

The President of the United States of America and His Majesty the King of Italy, being convinced of the necessity of adding some stipulations to the Extradition Convention concluded between the United States and Italy on the 23rd of March, 1868, with a view to the better administration of justice and the prevention of crime in their respective territories and jurisdictions, have resolved to conclude a supplementary convention for this purpose and have appointed as their plenipotentiaries, to wit:

The President of the United States, Frederick T. Frelinghuysen, Secretary of State of the United States;

And His Majesty the King of Italy, Baron Saverio Fava, His Envoy Extraordinary and Minister Plenipotentiary at Washington.

Who, after reciprocal communication of their full powers, which were bound to be in good and due form, have agreed upon the following articles:

Article I.

23 The following paragraph is added to the list of crimes on account of which extradition may be granted as provided in Article II of the aforesaid Convention of March 23, 1868;

9. Kidnapping of minors or adults, that is to say, the detention of one or more persons for the purpose of extorting money from them or their families, or for any other unlawful purpose.

Article II.

The following clause shall be inserted after Article V, of the aforesaid Convention of March 23, 1868;

Any competent judicial magistrate of either of the two countries shall be authorized after the exhibition of a certificate signed by the Minister of Foreign Affairs (of Italy) or the Secretary of State (of the United States) attesting that a requisition has been made by the Government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which, pursuant to this convention, extradition may be granted, and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said Magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided, if, however, the requisition together with the documents above provided for, shall not be made, as required, by the Diplomatic Representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days

24 from the date of the arrest of the accused, the prisoner shall be set at liberty.

### Article III.

These supplementary articles shall be considered as an integral part of the aforesaid original extradition convention of March 23, 1868, and together with the additional article of January 21, 1869, as having the same value and force as the Convention itself, and as destined to continue and terminate in the same manner.

The present Convention shall be ratified, and the ratifications exchanged at Washington as speedily as possible, and it shall take effect immediately after the said exchange of ratifications.

In testimony whereof, the representative plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at Washington this eleventh day of the month of June in the year of our Lord One thousand eight hundred and eighty-four.

FRED'K T. FRELINGHUYSEN. [SEAL.]  
FAVA. [SEAL.]

(Endorsed:) #6082. United States Circuit Court, District of New Jersey. In the Matter of the application of Paul Charlton for a writ of Habeas Corpus and a writ of Certiorari in the pending proceedings entitled "In the matter of the application for the extradition of Porter Charlton under the Treaty between the United States and Italy. Petition for Writs of habeas corpus and certiorari. R. Floyd Clarke, Attorney for Porter Charlton, No. 37 Wall Street, Borough of Manhattan City of New York, N. Y. Filed December 10, 1910, H. D. Oliphant, Clerk.

## 25 United States Circuit Court, District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus, &c.

It is on this tenth day of December A. D. 1910 ordered that the Attorneys of the Applicants give notice within three days of the granting of the writ herein to the United States Attorney for the District of New Jersey, to the Prosecutor of the Pleas of Hudson County and to the Italian Consulate in New York City, which notices may be served by mailing to said parties respectively.

JOHN RELLSTAB, *Judge*.

## 26 17-105. 6082. U. S. Circuit Court, District of New Jersey.

In the Matter of the application of Paul Charlton for a writ of habeas corpus &c. Order to give notice. Filed December 10, 1910. H. D. Oliphant, Clerk.

## 27 The President of the United States to Hon. John A. Blair, a Judge of the Court of Oyer &amp; Terminer of Hudson County, New Jersey, sitting as a Committing Magistrate and acting therein under authority conferred upon him by Act of Congress of 1848 concerning the extradition of fugitives from a foreign government under a treaty or convention between this and any foreign government and the acts amending and supplementing the same, in the proceeding entitled "Hudson County Court of Oyer &amp; Terminer, in the matter of the application for the extradition of Porter Charlton under the treaty between the United States of America and the Kingdom of Italy," and the Hon. P. C. Knox, Secretary of State of the United States of America, Greeting:

We command you that you return before a stated term of the Circuit of the United States for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer and State of New Jersey, on the 19th day of December, 1910, at 10:30 o'clock in the forenoon of that day, a true transcript of all proceedings had and taken before the said Magistrate against Porter Charlton under and pursuant to a warrant issued by said Magistrate on the 24th day of June, 1910, upon a complaint purporting to have been made by Gustavo di Rosa, Vice Consul of the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, and under and pursuant to a certain further warrant dated October 15, 1910, issued by said Magistrate, for the commitment of said Porter Charlton, so charged, to the County Jail of Hudson County

## 28 in the custody of James J. Kelly, Sheriff of Hudson County in Jersey City, there to remain until the surrender of the said prisoner should be made pursuant to the Act of Congress in such case made and provided, and also all proceedings taken before said Magistrate in said matter and to do and receive what shall

then and there be considered concerning the said matters, and have you then and there this writ.

Witness the Hon. John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 10th day of December, one thousand nine hundred and ten.

[L. s.]

H. D. OLIPHANT, *Clerk.*  
R. FLOYD CLARKE,  
*Attorney for Petitioner.*

Office and Post Office Address, 37 Wall Street, Borough of Manhattan, New York City.

A true copy.

[L. s.] H. D. OLIPHANT, *Clerk.*

Served the within writ of Certiorari on Judge John A. Blair, in Jersey City, N. J., this 10th day of December, 1910, by leaving a copy in his Chambers, No. 15 Exchange Place, in said Jersey City.

THOMAS J. ALCOTT,  
*Marshal, D. N. J.*  
By E. R. SEMPLE,  
*Chief Deputy.*

29 United States Circuit Court, District of New Jersey. In the Matter of The application of Porter Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the Matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." Writ of Certiorari. Filed December 12, 1910, H. D. Oliphant, Clerk. R. Floyd Clarke, Attorney for Petitioner, No. 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Let the within writ issue: John Rellstab. Dated 10 day of December, 1910.

30 The President of the United States to James J. Kelly, Sheriff of the County of Hudson, State of New Jersey, United States of America, Greeting:

We command you that you have the body of Porter Charlton by you imprisoned and detained as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Porter Charlton may be called or charged, at a stated term of the Circuit Court of the United States for the State of New Jersey, to be held in the New Jersey State Capitol Building in the City of Trenton and State of New Jersey, on the 19th day of December 1910, at 10:30 o'clock in the forenoon of that day, to do and receive whatsoever shall then and there be considered concerning the said Porter Charlton, and have you then and there this writ; and that at the same time you return all proceedings taken against the said Porter Charlton.

Witness, the Honorable John M. Harlan, Senior Associate Justice

of the Supreme Court of the United States, the tenth day of December One thousand Nine hundred and Ten.

[L. S.]

H. D. OLIPHANT, *Clerk.*

R. FLOYD CLARKE,  
*Attorney for Petitioner.*

Office & Post Office Address, 37 Wall Street, Borough of Manhattan, New York City.

Served the within Writ of Habeas Corpus on Patrick J. Sullivan, warden of the Hudson County Jail, personally, at Jersey City, N. J. this 10th day of December, 1910, by delivering to and leaving with said Sullivan a copy of said writ and at the same time informing him of its contents.

THOMAS J. ALCOTT,  
*Marshal, D. N. J.,*

By E. R. SEMPLE,  
*Chief Deputy.*

31 United States Circuit Court, District of New Jersey. In the matter of the application *fo* Porter Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the Application for the extradition of Porter Charlton under the treaty between the United States and Italy." Writ of habeas corpus and of certiorari. (Original.) Filed December 12, 1910. H. D. Oliphant, Clerk. R. Floyd Clarke, Attorney for Petitioner, No. 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Let the within writ issue. John Rellstab, Judge. Dated 10 day of December, 1910.

32 The President of the United States to Hon. John A. Blair, a Judge of the Court of Oyer & Terminer of Hudson County, New Jersey, sitting as a Committing Magistrate and acting therein under authority conferred upon him by Act of Congress of 1848, concerning the extradition of fugitives from a foreign government under a treaty or convention between this and any foreign government, and the acts amending and supplementing the same, in the proceeding entitled "Hudson County Court of Oyer & Terminer, in the matter of the application for the extradition of Porter Charlton under the treaty between the United States of America and the Kingdom of Italy," and the Hon. P. C. Knox, Secretary of State of the United States of America, Greeting:

We command you that you return before a stated term of the Circuit Court of the United States for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer and State of New Jersey, on the 19th day of December, 1910, at 10.30 o'clock in the forenoon of that day, a true transcript of all proceedings had and taken before the said Magistrate against Porter Charlton under and pursuant to a warrant issued by said Magistrate on the 24th day of June, 1910, upon a complaint purporting to have been made by Gustavo di Rosa, Vice Con-

33 sul of the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, and under and pursuant to a certain further warrant dated October 15, 1910 issued by said Magistrate, for the commitment of said Porter Charlton, so charged, to the County Jail of Hudson County in the custody of James J. Kelly, sheriff of Hudson County in Jersey City, there to remain until the surrender of the said prisoner should be made pursuant to the Act of Congress in such case made and provided, and also all proceedings taken before said Magistrate in said matter and to do and receive what shall then and there be considered concerning the said matters, and have you then and there this writ.

Witness the Hon. John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 10th day of December, One thousand nine hundred and ten.

[L. S.]

H. D. OLIPHANT, *Clerk*.  
R. FLOYD CLARKE,  
*Attorney for the Petitioner.*

Office and Post Office Address, 37 Wall Street, Borough of Manhattan, New York City.

34 31180. United States Circuit Court, District of New Jersey. 17-105. 6082. In the matter of the application for Porter Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the Application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original.) Writ of certiorari. R. Floyd Clarke, Att'y for ———, 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Let the within writ issue. Dated 10th day of December, 1910. John Rellstab.

Served copy of within writ on Hon. P. C. Knox, Secretary of State of the United States of America by service on Huntington Wilson, Assistant Secretary of State, Acting Secretary of State of the United States of America by delivering said copy to him in person in the District of Columbia this 12th day of December 1910.

AULICK PALMER,  
*U. S. Marshal District of Columbia.*  
S.

Filed Dec. 14, 1910. H. D. Oliphant, Clerk.

35 Hudson County Q. S. Sessions, Apr. Term, A. D. 1910.

No. —.

THE STATE  
vs.

PORTER CHARLTON.

Fugitive from Justice.

To the Keeper of the Common Jail of Hudson County:

Receive into your custody the body of Porter Charlton, who is



hereby committed to your Jail by order of the Court on the above charge.

JOHN F. CROSBY, *Clerk*.

Dated June 24th, 1910.

(Endorsed:) 1237. Commitment of ———. Officer: ———.  
 ———. Age: ——. Occupation: ——. Naticity: ——.

36

Recorder's Court, City of Hoboken.

THE STATE

vs.

PORTER CHARLTON.

Commitment on Charge of — for Further Examination.

CITY OF HOBOKEN,

*County of Hudson,*

*State of New Jersey, ss:*

To the Policemen of said City, the Sheriff, the Constables, and Keeper of the Common Jail of said County:

Whereas, Porter Charlton stands charged on oath, before the Recorder's Court of the City of Hoboken, by Patrick J. Hayes Chief of Police of Police Department, Hoboken that on the 23d day of June 1910, in the City of Hoboken, aforesaid, the said accused person Porter Charlton is a fugitive from Justice in that on or about the Eight- day of June in the year Nineteen Hundred and Ten in Moltrasio, Italy, He did commit the crime of Murder in that he did wilfully feloniously and of his malice aforethought kill and murder Mary Scott Charlton.

These are therefore, in the name of the State of New Jersey, to command you, the said Policemen, Sheriff and Constables, or one of you, to convey the said Porter Charlton to the said Jail; and the said Jailer is required to receive and keep him in the Jail of said County, until Tuesday, the 28th day of June next, when you are hereby required to bring him, again before the Recorder's Court of the City of Hoboken, to be re-examined, and further dealt with according to law; and for so doing this shall be your sufficient warrant.

These are therefore, in the name of the State of New Jersey, to require you, the said Policeman, Sheriff and Constables or one of you, to take the said accused person and deliver him to the  
 37 Keeper of the Jail aforesaid, who is required to receive the body of the said accused person into his Jail and custody, and him safely keep until thence delivered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal, this 24th day of June A. D. one thousand nine hundred and Ten.

JOHN J. MCGOVERN, *Recorder*.

(Endorsed:) 1237. Recorder's Court of the City of Hoboken. The State vs. Porter Charlton. Commitment to county jail for further examination. Dated June 24th 1910. John J. McGovern, Recorder.

## 38 Hudson Court of Oyer and Terminer.

In the Matter of the Application of PORTER CHARLTON under the Treaty Between the United States of America and the Kingdom of Italy.

HUDSON COUNTY, ss:

[Seal of Hudson County, New Jersey.]

The State of New Jersey to the Sheriff and Constables of the County of Hudson:

We command you that you take the body of Porter Charlton, against whom a complaint is made under oath charging said Porter Charlton, being found within the limits of the State of New Jersey, with having on or about the 7th day of June, A. D. 1910, at Moltrasio, in the Kingdom of Italy committed the crime of Murder upon his wife, Mary Charlton within the jurisdiction of the Kingdom of Italy and evidence of criminality having been heard before me and by me considered; and upon the said hearing sufficient evidence having been presented to sustain the charge, under the provisions of a certain treaty between the Governments of the United States of America and of the Kingdom of Italy and you are commanded him to convey to the Common Gaol of the said County of Hudson, who is hereby required him safely to keep until he shall be surrendered to the Kingdom of Italy under warrant from the Government of the United States, or until he be thence discharged by due course of law.

Witness Honorable John A. Blair, one of the Justices of the Court of Common Pleas, in and for the County of Hudson and in the absence of a Justice of the Supreme Court, sitting in and holding said Court of Oyer and Terminer the Fourteenth Day of October, A. D. Nineteen Hundred and Ten.

JOHN A. BLAIR, *Judge*.

40 STATE OF NEW JERSEY,  
*Hudson County, ss:*

I, John F. Crosby, Clerk of the County of Hudson, also Clerk of the Court of Oyer and Terminer holden therein, the same being a Court of Record with a Seal (which is hereto affixed,) do hereby certify that the foregoing is a true and correct copy of a certain Commitment of Porter Charlton, for Murder as the same is filed in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court and County at Jersey City, N. J., this Twelfth day of November A. D. 1910.

[SEAL.]

JOHN F. CROSBY, *Clerk*.

I, John A. Blair, Presiding Judge of the Court of Oyer and Terminer holden in and for said County of Hudson do hereby certify that John F. Crosby, Esquire, whose name is subscribed to the

preceding attestation, is the Clerk of the said County of Hudson, and also Clerk of the said Court, holden in and for said County, duly elected commissioned and sworn and that full faith and credit are due to his official acts; I further certify that the seal affixed to the said attestation is the seal of our said Court, and that the attestation thereof is in due form.

Witness my hand at Jersey City, this 14th day of November A. D. 1910.

JOHN A. BLAIR, *Judge*.

STATE OF NEW JERSEY,  
*Hudson County, ss:*

41 I, John F. Crosby, Clerk of the County of Hudson, and also Clerk of the Court of the Court of Oyer and Terminer holden therein, do hereby certify that Honorable John A. Blair whose name is subscribed to the preceding certificate, is presiding Judge of the said Court, holden in and for the said County of Hudson, duly commissioned and sworn, and that the signature of said Judge to said certificate is genuine.

In witness whereof, I have hereunto set my hand, and affixed the seal of the said Court and County, at Jersey City, N. J., this fourteenth day of November A. D., 1910.

JOHN F. CROSBY, *Clerk*.

42 In the Matter of the Application for the Extradition of  
PORTER CHARLTON under the Treaty Between the United  
States and the Kingdom of Italy.

To the Honorable John A. Blair, one of the Judges of the Court of Oyer and Terminer in and for the County of Hudson, State of New Jersey:

Gustavo Di Rosa, Vice-Consul for the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, being duly sworn deposes and says, upon information and belief:

First. That one Porter Charlton did heretofore to wit: on or about the Seventh day of June, Nineteen hundred and ten, at Moltrasio, in the Province of Como, in the Kingdom of Italy one Mary Charlton wilfully, feloniously and of his malice aforethought kill and slay, by striking, beating and wounding the said Mary in and upon the head and body with a certain mallet held by him the said Porter Charlton, thereby and therewith beating the — Mary into unconsciousness and insensibility from which she did not recover consciousness before the body of her the said Mary was placed by the said Porter Charlton into a trunk, which he the said Porter Charlton threw from a certain dock into a lake known as lake Como.

And that deponent has obtained his information from telegrams, letters, cablegrams and other correspondence from the Secretary of the Interior of the Kingdom of Italy addressed to the Consul General of Italy of this jurisdiction and further from a statement

made by the said Porter Charlton and taken down in writing and signed by him in the presence of witnesses, which said statement is in effect and of the following tenor to wit:

43                      Police Department, City of Hoboken.

CITY OF HOBOKEN, COUNTY OF HUDSON,  
*State of New Jersey:*

STATE  
vs.  
PORTER CHARLTON.

The voluntary examination of the above named defendant Porter Charlton charged with fugitive from justice taken before me Patrick Hayes, Jr. Chief of Police of the City of Hoboken, after the said defendant has been duly cautioned as to his rights and privileges.

My name is Porter Charlton. I live at 204 West 55th St. N. Y. City, I am 21 years of age; I was born Omaha, Neb., I am married; My occupation is Bank Clerk. In reference to the charge made against me:

My wife and I lived very happily together. She was the best woman in the world to me. But she had an ungovernable temper and so had I. We frequently quarrelled over the most trivial matters and her language to me was very foul, language that I know she did not know the meaning of, I am sure. The night I struck her, she had been quarrelling with me. It was the worst temper I ever saw her in. I told her that if she did not cease, I would put a stop to it. She quit for a while and after a short time renewed her abuse of me. I was dazed and struck her with a sort of a mallet that I had been using to straighten out the leg of the couch we had been using. I struck her two or three times and thought she was dead. I then placed her body in the trunk and threw the mallet in also. About 12 o'clock that night I removed the trunk from the house and dragged it down to a small pier near the house and threw it overboard. I remained at Moltrasio the next day and left there the following night. I went to Como and from there to

44      Genoa where I took the steamer Princess Irene about four days later. The room where I killed her was a sort of an outdoor sleeping apartment.

PORTER CHARLTON.

I have been informed that Mr. C. N. Ispolatoff has been implicated in this matter but wish to say that this gentleman is absolutely guiltless. I have no defense to make and wish none.

PORTER CHARLTON.

PATRICK HAYES, JR.,  
*Chief of Police.*

THOMAS GARRICK.  
MICHAEL FALLON.  
LOUIS S. WEINTHAL.

45 The offense hereabove described is within the crimes contained in the treaty heretofore referred to.

That said Porter Charlton has fled from said Kingdom of Italy and is now held in custody by the Police Department of the City of Hoboken, in the County of Hudson and State of New Jersey.

That a request for the extradition and rendition of the said Porter Charlton by the Government of the United States to the Government of the Kingdom of Italy has been made upon the Secretary of State at Washington D. C. by Marquis Paolo di Montagliari, Italian Charge de Affaires at Washington D. C.

Therefore deponent prays that a warrant and commitment for the person of said Porter Charlton may issue out of your Honorable Court, whereby he may be apprehended and confined in the common jail in and for the County of Hudson until thence discharged by due process of law or rendered by the Government of the United States to the Kingdom of Italy.

GUSTAVO DI ROSA,  
*Vice Console di S. M.*

Sworn and Subscribed to before me, a Magistrate in and for the County of Hudson in the State of New Jersey at the City of Hoboken, on the twenty-fourth day of June, A. D. Nineteen hundred and ten.

[Seal of Recorder's Court, Hoboken, N. J.]

JOHN J. McGOVERN.

Filed June 24, 1910, in the Office of the Clerk of Court of Oyer and Terminer holden in and for the County of Hudson, New Jersey, John F. Crosby, Clerk.

46 Hudson Court of Oyer & Terminer.

In the Matter of the Application of PORTER CHARLTON, Under the Treaty Between the United States of America and the Kingdom of Italy.

HUDSON COUNTY, ss:

The State of New Jersey to the Sheriff and Constables of the County of Hudson:

We command you that you take the body of Porter Charlton, against whom a complaint is made under oath, charging said Porter Charlton, being found within the limits of the State of New Jersey, with having, on or about the 7th day of June, A. D. 1910, at Moltrasio, in the Kingdom of Italy, committed the crime of murder upon his wife, Mary Charlton, within the jurisdiction of the Kingdom of Italy; and evidence of criminality having been heard before me and *and* by me considered; and upon the said hearing sufficient evidence having been presented to sustain the charge, under the provisions of a certain Treaty between the Governments of the

United States of America and of the Kingdom of Italy and you are commanded him to convey to the keeper of the common Gaol of the said County of Hudson, who is hereby required him safely to keep until he shall be surrendered to to the Kingdom of Italy, under warrant from the Government of the United States, or until he be thence discharged by due course of law.

Witness: Honorable John A. Blair, one of the Justices of the Court of Common Pleas, in and for the County of Hudson,  
47 and in the absence of a Justice of the Supreme Court sitting in and holding said Court of Oyer and Terminer, the fourteenth day of October, A. D. nineteen hundred and ten.

JOHN A. BLAIR, *Judge*.

Filed Nov. 12, 1910, in the Office of the Clerk of Court of Oyer and Terminer holden in and for the County of Hudson New Jersey.

JOHN F. CROSBY, *Clerk*.

48 STATE OF NEW JERSEY,  
*Hudson County, ss:*

I, John F. Crosby Clerk of the County of Hudson, and also Clerk of the Court of Oyer and Terminer holden therein, the same being a Court of Record with A Seal (which is hereto affixed), do hereby certify that the foregoing is a true and correct copy of a certain application for extradition of Porter Charlton under Treaty between the United States and the Kingdom of Italy and order for commitment thereon as the same is filed in my office.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court and County at Jersey City, N. J., this Fifteenth day of December A. D., 1910.

[L. s.]

JOHN F. CROSBY, *Clerk*.

I, John A. Blair, Presiding Judge of the Court of Oyer and Terminer holden in and for said County of Hudson do hereby certify that John F. Crosby, Esquire, whose name is subscribed to the preceding attestation, is the Clerk of the said County of Hudson, and also Clerk of the said Court, holden in and for said County duly elected commissioned and sworn, and that full faith and credit are due to his official acts; I further certify that the seal affixed to the said attestation is the seal of our said Court, and that the attestation thereof is in due form.

Witness my hand at Jersey City, this 15th day of December A. D., 1910.

JOHN A. BLAIR, *Judge*.

STATE OF NEW JERSEY,  
*Hudson County, ss:*

49 I, John F. Crosby, Clerk of the County of Hudson, and also Clerk of the Court of Oyer and Terminer holden therein, do hereby certify that Honorable John A. Blair whose name is subscribed to the preceding certificate, is presiding Judge of the

said Court, holden in and for the said County of Hudson duly commissioned and sworn, and that the signature of said Judge to said certificate is genuine.

In witness whereof, I have hereunto set my hand, and affixed the seal of the said Court and County, at Jersey City, N. J., this Fifteenth day of December, A. D., 1910.

[L. s.]

JOHN F. CROSBY, *Clerk.*

50 The President of the United States to James J. Kelly, Sheriff of the County of Hudson, State of New Jersey, United States of America, Greeting:

We command you that you have the body of Porter Charlton by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Porter Charlton may be called or charged, at a stated term of the Circuit Court of the United States for the State of New Jersey, to be held in the New Jersey State Capitol Building in the City of Trenton and State of New Jersey, on the 19th day of December, 1910, at 10:30 o'clock in the forenoon of that day, to do and receive whatsoever shall then and there be considered concerning the said Porter Charlton, and have you then and there this writ; and that at the same time you return all proceedings taken against the said Porter Charlton.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the tenth day of December One thousand Nine hundred and Ten.

[L. s.] H. D. OLIPHANT, *Clerk.*

R. FLOYD CLARKE,  
*Attorney for Petitioner.*

Office & Post Office Address: 37 Wall Street, Borough of Manhattan, New York City.

A true copy.

[L. s.] H. D. OLIPHANT, *Clerk.*

51 (Endorsed:) United States Circuit Court, District of New Jersey. In the Matter of the application of Porter Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the Matter of the Application for the extradition of Porter Charlton under the Treaty between the United States and Italy." Writ of habeas corpus and of certiorari. Due service of — — is hereby admitted — day of — — 19—, — —, attorney for — —. R. Floyd Clarke, Attorney for Petitioner, No. 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Let the within writ issue. Dated 10 day of December 1910. John Rellstab, Judge.



52

— Court.

— —, Plaintiff,  
 against  
 — —, Defendant.

Please take notice that the — of which the annexed paper is a true copy was duly filed and entered with the clerk of the — Court — County, in the above entitled action on the — day of —, 19—.  
 — day of —, 19—.

— —,  
*Attorney for — —.*

37 Wall Street, Borough of Manhattan, City of New York, N. Y.  
 To — —, Attorney for — —.

53 United States Circuit Court, District of New Jersey.

In the Matter of the Application of PORTER CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceedings Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

To the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States:

By virtue of the annexed writ to me directed I do return that I have the body of Porter Charlton, therein named, imprisoned in the common jail of the county of Hudson, and I do certify that he is so imprisoned and detained by virtue of a commitment issued by the Honorable John A. Blair one of the Justices of the Court of Common Pleas, in and for the County of Hudson, and in the absence of a Justice of the Supreme Court, sitting in and holding said Court of Oyer and Terminer; a copy of which commitment is hereto annexed, which is the sole cause for his imprisonment and detention. And that in further compliance with the Mandate of the annexed Writ I have attached hereto and made a part hereof certified copies of all proceedings against the said Porter Charlton.

JAMES J. KELLY, *Sheriff.*

54 17-105. 6082. United States Circuit Court-District of New Jersey. In the Matter of the application of Porter Charlton for a writ of Habeas Corpus and a Writ of Certiorari in the pending proceeding entitled "In the Matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy. Return to Writ of Habeas Corpus. Filed December 19, 1910. H. D. Oliphant, Clerk.

DEPARTMENT OF STATE,  
WASHINGTON, *December 17, 1910.*

The Clerk of the Circuit Court of the United States for the District of New Jersey, Trenton, New Jersey:

SIR: At the request of Mr. R. Floyd Clarke, Attorney for Porter Charlton, I enclose a certified copy of the formal requisition made by the Italian Government for the extradition of Charlton, bearing date July 28th last.

I am, sir,

Your obedient servant,

For Mr. Knox:

HUNTINGTON WILSON,  
*Assistant Secretary of State.*

Enclosure: From Italian Embassy, July 28, 1910, with translation. FV T/St SGS 211,65C38/74.

FV

(Copy of Envelope.)

Department of State, U. S. A.  
Official Business.

Penalty for  
Private Use, \$300.

The Clerk of the Circuit Court of the  
United States for the District of New Jersey.

Registered  
378,782.  
Dec. 18, 1910.

Trenton,  
New Jersey. 16,500.

*Notice.*

{ Washington, D. C. }  
  { Dec. 17, 1910 }  
      { 6 }  
  { Registered } }

{ Trenton, N. J. }  
  { Dec. 18, 1910 }  
  { Registered }

{ Washington, D. C. }  
  { Dec. 17, 1910 }  
      { 6 }  
  { Registered }

UNITED STATES OF AMERICA,  
*Department of State:*

To all to whom these presents shall come, Greeting:

I Certify That the documents hereto annexed are true copies from the files of this Department.

In testimony whereof, I, P. C. Knox, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citi-

zenship of the said Department, at the City of Washington, this 17th day of December, 1910.

[L. S.]

P. C. KNOX,

*Secretary of State,*

By R. W. FLOURNOY, JR.,  
*Chief, Bureau of Citizenship.*

57

Regia Ambasciata D'Italia,

Washington, D. C.

No. 1229.

MANCHESTER, MASS., 28 luglio, 1910.

SIGNOR SEGRETARIO DI STATO:

Con riferimento a precedenti comunicazioni e conformemente al disposto dell'articolo V della Convenzione di Estradizione del 23 marzo 1868, ho l'onore di presentare a Vostra Eccellenza formale domanda per l'estradizione del nominato Porter Charlton, reo confesso del delitto di omicidio commesso sulla persona della propria moglie a Moltrasio (Como) delitto contemplato allo articolo II, alinea I, della predetta Convenzione.

Per l'arresto provvisorio del su menzionato imputato Vostra Eccellenza ha già avuto la cortesia di farmi tenere, con Sua nota del 28 giugno scorso, No. 864, il certificato preliminare d'arresto contemplato dall' articolo II della Convenzione Addizionale dell'11 Giugno 1884.

A conferma di questa domanda ho l'onore di trasmettere qui unito a Vostra Eccellenza gli atti dell' istruttoria compiuta dal Tribunal di Como a riguardo del predetto omicidio. Tali documenti sono stati regolarmente visti dalla Ambasciata degli Stati Uniti in Roma.

In attesa del relative "warrant" Federale e della cortest restituzione di questi documenti per essere presentati al Tribunale competente, colgo l'incontro per rinnovar Le, Signor Segretario di Stato, insieme ai miei anticipati ringraziamenti, gli atti della mia piu' alta considerazione.

MONTAGLIARI.

A Sua Eccellenza L'On. P. C. Knox, Segretario di Stato, Washington.

58

*Translation.*

ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., July 28, 1910.

No. 1229.

Mr. Secretary of State:

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before Your Excellency a formal request for the extradition of Porter Charlton who has confessed

the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II, section I of the said Convention.

Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

In support of this request I have the honor to transmit herewith to Your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly vis  d by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return of the enclosed papers for submission to the competent court, I avail myself of this opportunity to renew to Your Excellency, together with my thanks in advance, the assurance of my highest consideration.

MONTAGLIARI.

59 United States Circuit Court, District of New Jersey. In the matter of the application of *Paul Charlton* for a Writ of Habeas Corpus. Copy of Requisition made by Italian Government, certified by Secretary of State, December 17, 1910. Filed December 18, 1910. H. D. Oliphant, Clerk.

60

DEPARTMENT OF STATE,  
WASHINGTON, December 16, 1910.

The Clerk of the Circuit Court of the United States for the District of New Jersey, Trenton, N. J.

SIR: Referring to the application of Porter Charlton for a writ of habeas corpus and a writ of certiorari, I return herewith the writ of certiorari and transmit a copy, certified by the Department of State, of the transcript of the proceedings had before Judge Blair, of the exhibits attached thereto, and of the translations of the proceedings had in Italy.

I am, Sir,

Your obedient servant,

P. C. KNOX.

Enclosures:

As above.

11.65C38.

FV.—T/C.

61

No. 5432.

UNITED STATES OF AMERICA,  
*Department of State:*

To all to whom these presents shall come, Greeting:

I Certify, That the attached papers are a copy of the transcript of the proceedings had before the Honorable John A. Blair, — Court of Oyer and Terminer, Hudson County, New Jersey, in the matter of

the application for the extradition of Porter Charlton, of the exhibits attached thereto, and of the translation of the proceedings had in Italy.

In Testimony Whereof, I, P. C. Knox, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citizenship of the said Department, at the City of Washington, this sixteenth day of December, 1910.

[L. S.]

P. C. KNOX,  
*Secretary of State,*  
By R. W. FLOURNOY, JR.,  
*Chief Bureau of Citizenship.*

62 THE UNITED STATES OF AMERICA,  
*State of New Jersey, County of Hudson:*

In the Matter of the Extradition of PORTER CHARLTON.

I, John A. Blair, one of the Judges of the Court of Oyer and Terminer, in and for the County of Hudson, State of New Jersey, do hereby certify that it appears from the transcript that has been forwarded to the Secretary of State, that the commitment in this case of Porter Charlton to the County Jail, was on the twenty-first day of September. That date is erroneous, the fact being that on the twenty-first day of September there was a hearing, and the matter was not determined until the fourteenth day of October. On the last mentioned date the said Porter Charlton was committed to the County Jail. A copy of the commitment is hereby annexed and duly certified.

Witness my hand and seal this fifteenth day of November, A. D. one thousand nine hundred and ten.

JOHN A. BLAIR,  
*One of the Judges of the Court of Common Pleas in and for the County of Hudson and, in the Absence of a Justice of the Supreme Court, Sitting in and Holding said Court of Oyer and Terminer.*

63

Attest:  
[SEAL.] JOHN F. CROSBY,  
*Clerk of the County of Hudson, in the State of New Jersey, and Clerk of the Court of Oyer and Terminer Holden Therein, with the Seal of said Court and County Hereto Affixed.*

In the Matter of the Application of PORTER CHARLTON under the Treaty Between the United States of America and the Kingdom of Italy.

HUDSON COUNTY, ss:

[L. s.]

The State of New Jersey to the Sheriff and Constable of the County of Hudson:

We command you that you take the body of Porter Charlton, against whom a complaint is made under oath, charging said Porter Charlton, being found within the limits of the State of New Jersey, with having, on or about the 7th day of June, A. D. 1910, at Moltrasio, in the Kingdom of Italy, committed the crime of murder upon his wife Mary Charlton, within the jurisdiction of the Kingdom of Italy; and evidence of criminality having been heard before me and by me considered; and upon the said hearing sufficient evidence having been presented to sustain the charge, under the provisions of a certain treaty between the Government of the United States of America and of the kingdom of Italy; and you are commanded him to convey to the keeper of the Common Gaol of the said County of Hudson, who is hereby required him safety to keep until he shall be surrendered to the Kingdom of Italy, under warrant from the government of the United States, or until he be thence discharged by due course of law.

Witness: Honorable John A. Blair, one of the Justices of the Court of Common Pleas, in and for the County of Hudson, and in the absence of a Justice of the Supreme Court, sitting in and holding said Court of Oyer and Terminer, the Fourteenth day of October, A. D. nineteen hundred and ten.

JOHN A. BLAIR, *Judge.*

STATE OF NEW JERSEY,  
*Hudson County, ss:*

I, John F. Crosby, Clerk of the County of Hudson, and also Clerk of the Court of Oyer and Terminer holden therein, the same being a Court of Record with a Seal (which is hereto affixed,) do hereby certify that the foregoing is a true and correct copy of a certain Commitment of Porter Charlton on charge of Murder as the same is filed in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court and County at Jersey City, N. J., this Fourteenth day of November, A. D. 1910.

[SEAL.]

JOHN F. CROSBY, *Clerk.*

I, John A. Blair, Presiding Judge of the Court of Oyer and Terminer holden in and for said County of Hudson do hereby certify that John F. Crosby, Esquire, whose name is subscribed to the preceding attestation, is the Clerk of the said County of Hudson, and also Clerk

of the said Court, holden in and for said County, duly elected commissioned and sworn, and that full faith and credit are due to his official acts; I further certify that the seal affixed to the said attestation is the seal of our said Court, and that the attestation thereof is in due form.

Witness my hand at Jersey City, this 14th day of November, A. D. 1910.

JOHN A. BLAIR, *Judge.*

66 STATE OF NEW JERSEY,  
*Hudson County, ss:*

I, John F. Crosby, Clerk of the County of Hudson, and also Clerk of the Court of Oyer and Terminer holden therein, do hereby certify that Honorable John A. Blair whose name is subscribed to the preceding certificate, is presiding Judge of the said Court, holden in and for the said County of Hudson, duly commissioned and sworn, and that the signature of said Judge to said certificate is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, at Jersey City, N. J. this Fourteenth day of November, A. D. 1910.

[SEAL.]

JOHN F. CROSBY, *Clerk.*

67 Before Honorable John A. Blair, Oyer and Terminer Court,  
Hudson County, New Jersey.

STATE  
vs.  
PORTER CHARLTON.

Transcript of Proceedings on Hearing of Application for Extradition, June 28th, July 8th, August 11th, and September 21st, 1910, and Exhibits.

68 THE UNITED STATES OF AMERICA,  
*State of New Jersey, County of Hudson*

In the Matter of the Extradition of PORTER CHARLTON.

I, John A. Blair, one of the Judges of the Court of Oyer and Terminer, in and for the County of Hudson, State of New Jersey, being duly authorized by law to issue the warrant for the arrest of Porter Charlton, and to hear evidence in respect to the charge against Porter Charlton, and proceed, according to law, in the matter of the extradition of Porter Charlton, a fugitive from justice, from the Kingdom of Italy, a foreign government, under a Treaty existing between the United States and said Kingdom of Italy, do hereby certify that a complaint was duly made on oath and in writing, before me, by Gustavo Di Rosa, Vice Consul for the Kingdom of Italy in the United States of America, charging Porter Charlton with having committed the crime of murder within the jurisdiction



of the government of Italy; and that, the said Porter Charlton being a fugitive from the justice of said country, I thereupon issued my warrant for the arrest of the said Porter Charlton, directed to the sheriff of the County of Hudson, State of New Jersey, and by virtue thereof, the said Porter Charlton was, by the said Sheriff, arrested and brought before me for examination and hearing upon said charge; and that said examination and hearing was held on the twenty-eighth day of June, A. D. 1910, and postponed at the request of the said Porter Charlton, until the eighth day of July, A. D. 1910, and again postponed, at the request of the said Porter Charlton, until the eleventh day of August, A. D. 1910, and again at the request of the said Porter Charlton a further postponement was granted until the twenty-first day of September, A. D. 1910; and that on that day, at the Court House, in the City of Jersey City, County of Hudson, State of New Jersey, William D. Edwards, Edwin F. Smith and Floyd Clark, appearing as Counsel for the prisoner and Pierre P. Garven as Counsel for the Italian Government, evidence was adduced before me which I consider sufficient evidence to sustain the charge, under the law and the provisions of the Treaty of Extradition between the government of the United States and the government of Italy; and that I have, accordingly, by my warrant, under my hand and official seal, on the twenty-first day of September, A. D. 1910, committed him, the said Porter Charlton, to the Hudson County Jail, in the City of Jersey City, there to be safely kept until he shall be surrendered to the Kingdom of Italy under warrant from the Government of the United States, or until he be thence discharged by due process of law.

I further certify that the following is a true copy of the testimony taken before me on said hearing and examination.

Witness my hand and seal this second day of November, A. D. One Thousand Nine Hundred and Ten.

JOHN A. BLAIR,

*One of the Judges of the Court of Common Pleas in and for the County of Hudson and, in the Absence of a Justice of the Supreme Court, Sitting in and Holding said Court of Oyer and Terminer.*

Attest:

[SEAL.]

JOB F. CROSBY, Clerk.

70 Before Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Tuesday, June 28th, 1910.

STATE

VS.

PORTER CHARLTON.

Said prisoner being held on complaint that he is a fugitive from justice in Italy.

Mr. Pierre P. Garven, Prosecutor of the Pleas of Hudson County, appeared for the State, and for the Italian Government.

Mr. Edwin F. Smith appeared for the defendant.

The prisoner was brought into court.

Mr. GARVEN: May it please the Court, the State is prepared to produce evidence before the Court on the extradition matter of Porter Charlton.

Mr. SMITH: We desire to have a postponement until the eighth of July, and we agree not to apply for any habeas corpus proceedings during that time.

Mr. GARVEN: We have no objection to the adjournment on the stipulation that no proceedings will be instituted in the meantime to take this man from the custody of the court here.

Furthermore, we think the State will produce evidence which will show a prima facie case.

Mr. SMITH: We will make that stipulation, and your Honor may make it a matter of record.

71 The COURT: The Court, on the application made by the counsel, and with the consent of the State, will grant an adjournment until the eighth day of July, with the distinct understanding that during that period of adjournment no application or proceeding shall be instituted for the release of the prisoner from the custody of this Court.

The prisoner may be remanded meantime.

The prisoner was then removed from the court room.

72 Before Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Friday, July 8th, 1910.

STATE

vs.

PORTER CHARLTON.

In the Matter of the Extradition of the Prisoner, Held on a Complaint of Murder Committed in Italy.

Mr. Pierre P. Garven, Prosecutor of the Pleas of Hudson County, appeared for the State, and for the Italian Government.

Mr. Edwin F. Smith appeared for the defendant.

The defendant is present in Court.

Mr. Gustafo di Rosa, of the Italian Consulate, presented the certificate or mandate from U. S. Secretary of State (See page 15) to Judge Blair.

Mr. GARVEN: Mr. Smith asks for an adjournment of the hearing on the matter. We agree to the adjournment on the same stipulation made when the previous adjournment was granted, that there shall be no proceedings meantime. The matter may be adjourned to any day that is agreeable under that understanding.

Mr. SMITH: Yes, we will continue that same stipulation.

The COURT: Adjourned to August 11th, 1910.  
The prisoner may be taken back to jail meantime.  
The prisoner was then taken out of the court.

- 73 Before the Hon. John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Thursday, August 11th, 1910.

STATE

vs.

PORTER CHARLTON.

Mr. VICKERS: I introduce Mr. De Rossa, Italian Consul at New York, who wishes to present the dossier so as to have it appear on the record that the Italian Government at this day of adjournment is ready.

The COURT: I suppose that nothing can be done now further than to formally receive this, and hold the matter until the expiration of the period of adjournment.

Mr. VICKERS: I understand it to be the rule that a translation is required, and Mr. De Rossa tells me none has been had.

The COURT: I suppose then that perhaps it ought to be translated.

Mr. DE ROSSA: I would prefer to do it. Isn't it sufficient to certify to the correctness of the signature? It will then be adjourned to the 21st of September? In the meantime it is directed that there shall be evidence?

The COURT: Yes.

Mr. VICKERS: Will your Honor consider that the papers are filed, and permit the Italian Vice-Consul also to take them from the files for translation?

The COURT: Yes.

- 74 Before the Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Wednesday, September 21, 1910.

STATE

vs.

PORTER CHARLTON.

Hearing on the Application for Extradition of the Prisoner PORTER CHARLTON.

This matter came on to be heard before the Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County in the State of New Jersey, sitting as a committing magistrate, in the Court House in Jersey City, on the twenty-first day of September, Nineteen hundred and Ten.

The prisoner was brought into court.

Mr. Pierre P. Garven, the Prosecutor of the Pleas of Hudson County, and Mr. George T. Vickers, the First Assistant prosecutor

of the Pleas of Hudson County, appeared for the State and for the Italian Government.

Mr. William D. Edwards, Mr. Edwin F. Smith and Mr. Floyd Clarke, appeared for the prisoner.

Mr. GARVEN: If the Court please, I move the matter of the application for the extradition of Porter Charlton. I understand from his counsel that there is no objection to this copy of the complaint being used instead of the original and it is hardly necessary for me to read it to the Court. Your Honor is familiar with the  
75 complaint, and I will simply offer it in evidence.

Mr. EDWARDS: That is all right; we do not object to the copy being used instead of the original.

(Complaint received in evidence and marked S/1—J. M.)

Mr. GARVEN: I ask the counsel to admit that this defendant is Porter Charlton for whom the Italian Government has requisitioned the United States Government, and that he was arrested and confined in the County Jail here on the Complaint which has been introduced in evidence here, and has been confined since that time here in the County Jail.

Mr. EDWARDS: If the Court please, I have associated with me Mr. R. Floyd Clarke, a member of the New York Bar, whom I desire to introduce to the Court, and I ask that he be permitted to be heard in this matter.

The COURT: That may be done.

Mr. CLARKE: I am willing to admit for the defendant that he was arrested on the 24th of June, 1910, on a complaint, but I am unable to admit that there is or was any requisition made by the Italian Government.

We will also admit that the prisoner is the Porter Charlton mentioned in the Complaint, and is the Porter Charlton mentioned in the dossier.

Mr. GARVEN: It is admitted that Porter Charlton this defendant, married Mary Scott Castle on or about the twelfth day of March, 1910, in the United States of America, and that he was her husband on the day of this alleged murder.

Mr. EDWARDS: That is admitted.

Mr. GARVEN: We will now call as a witness a Vice-Consul of the Italian Government, Mr. Gustafo di Rosa.

76 GUSTAFO DI ROSA, called by the State and sworn according to law, testified as follows:

Direct examination by Mr. GARVEN:

Q. You hold an official position under the Italian Government?

A. Yes.

Q. What is it?

A. First Assistant Vice Consul of Italy in New York City.

Q. I show you a paper purporting to be a dossier and ask you if you have seen that paper before?

A. Yes, I did.

Q. From whom did you get it?

A. From The Foreign Office in Rome, of the Italian Government.

Q. In your official position as Vice-Consul of the Italian Government?

A. Yes.

Q. Did you personally bring that dossier before this Court at any time during that last month or two?

A. Do you mean this one?

Q. Yes.

A. This one I don't know.

Q. Or a translation of it?

A. The translation was sent by Mr. Di Marossi.

Q. Did you bring the original in this Court?

A. The first time, that I have brought it here now.

Q. Did you understand my question?

A. I did not know it.

Q. Have you heretofore presented that document which is now before you, the dossier, to Judge Blair?

A. Yes, this one, yes, for the Judge; just presented it, but not left.

Q. That document you have in your hand?

A. Yes.

Q. Did you present it to Judge Blair?

A. Yes.

Q. What day?

A. I don't remember.

Q. A month ago, or a week ago?

(Objected to.)

77 Q. About when?

A. The last time you were here.

Q. Can you give us an idea of the date?

A. I don't know.

Q. Was it in September, August or July?

A. I don't remember what was the date; I think it was in September.

Q. What is it?

A. I think it was in August, but I don't remember; it is no use to ask me the date.

Q. Was that the last adjourned day of this case?

(Objected to that he cannot know it.)

Q. Do you remember whether it was the last adjourned day or not?

A. I don't remember.

Q. Was it the first part of August or the last part of August?

(Objected to as being cross examination of the State's own witness.)

Q. Was it on the 11th day of August, the last day of the hearing, you presented that to Judge Blair?

A. I can't remember the date but it was the last hearing here before the Jersey City Court.

It is admitted that the dossier was presented the first time on August 11th to Judge Blair.

Q. Did you have that dossier translated?

A. Yes.

Q. By whom?

A. By a gentleman who is here present, Mr. Caboni.

Cross-examination by Mr. EDWARDS:

Q. Who requested you to have it translated?

A. The Judge.

Q. Did you take it back with you the same day you brought it to him?

A. Yes.

Q. You did not leave it with him then?

A. No.

78 Q. Have you had it in your possession ever since?

A. Ever since.

Q. Then it was never in Judge Blair's possession—physical possession—never was in Judge Blair's physical possession, except on August 11th, when you presented it for a moment?

(Objected to as immaterial and irrelevant, and that the Court will take judicial notice of whether it was in the Court's physical possession.)

Q. You have had it in your possession ever since August 11th?

A. Ever since the last hearing, if that was August 11th.

Q. How long did Judge Blair have it in his possession?

A. I don't know.

Q. Five or ten minutes?

A. I don't remember; I did not count the minutes.

Q. You came over with the paper?

A. Yes.

Q. And you went back with it?

A. Yes.

Q. What time did you leave the office in New York?

(Objected to as immaterial. Question overruled.)

Q. Where did you give it to Judge Blair?

A. In the court house—in the other court House.

Q. You were in the Court House how long at that time?

(Objected to as immaterial. Question overruled. Exception by defendant's counsel.)

Q. Did Judge Blair give it back to you immediately after you handed it to him?

(Objected to as irrelevant and immaterial.)

The COURT: He may answer as a matter of recollection.

A. I can't count the minutes.

Q. If it was less than half an hour?

A. I think it was less than half an hour.

Q. You are the Vice Consul?

A. Yes, First Vice Consul.

79 Q. Who is your superior?

A. The consul General.

Q. What is his name?

A. Farapuli.

Q. Where was he on August 11th?

A. I don't know.

Q. Was he in New York on August 11th?

A. What day is that?

Q. The day you came over with the dossier.

A. I suppose he was in New York; I can't tell that.

Q. He was not away on his vacation at that time?

A. No.

Q. Is this dossier in the same condition that it was on the day you handed it to Judge Blair?

A. Yes.

Q. Was there any mark of filing put upon this paper on that day so far as you know?

A. No.

Q. You said in your direct examination that this was sent by the Italian Government. To whom was it sent?

A. If I remember it was sent to the Embassy at Washington, but not they are at Manchester for the summer.

Q. This is all the paper that you filed or presented to Judge Blair?

A. We presented some other paper, we signed some affidavit.

Q. But the day you gave this paper to Judge Blair you gave no other paper?

A. No.

Q. And you received no other paper?

A. No.

Q. By the Italian Embassy you mean the Embassy at Washington of the Italian Government?

A. Yes, of the Italian Government.

Redirect by Mr. GARVEN:

Q. I show you a certificate and ask you whether you presented that certificate to Judge Blair at the hearing of this case on July 8th?

A. Yes.

80 Q. Was it at the first hearing after the date of this certificate?

A. Yes.

Mr. GARVEN: I offer this certificate in evidence.

Mr. EDWARDS: One moment. Before its admission I want to examine upon it.

(It is handed to Mr. Edwards.)



Recross by Mr. EDWARDS:

Q. When did you hand this to Judge Blair? The same time you gave him the dossier?

A. No, Sir.

Q. When did you hand it to him?

A. In the month of July, the second hearing we had.

Q. Can't you give us the date?

A. I can't remember very well, but I think it was the eighth.

Q. Are you sure it was in the month of July; may it not have been in the month of August?

A. No, because the month of August was when we handed the dossier.

Q. How do you know this was not handed the same time in the month of August?

A. Because this came after the extradition and the dossier came by mail. This came from the United States and the other things came from Italy.

Q. When did you give it to Judge Blair?

A. In July.

Q. What did he do with it?

A. I don't remember.

Q. Did he hand it back to you?

A. I don't remember.

Q. Who brought it in court this morning?

A. I think my assistant.

Q. Where did you have it all the time?

A. I think he has it, my assistant.

Q. How long did you leave it with Judge Blair?

A. I don't remember.

Q. Over half an hour?

A. I don't remember.

81 Q. But you took it back the same day you showed it to him?

A. I don't remember.

Q. Did you not take it back to New York?

A. It may be I did; I don't remember.

Q. But as a matter of fact don't you know it came from your office this morning?

A. If you ask me this morning I can say, but not in July.

Q. Where was it until this time?

A. I think Mr. Marosi can tell you. I can't remember.

Q. Can't you remember?

A. I have so many things to remember, I can't remember it.

Q. This was not important?

A. Everything is important but I can't remember everything, and I am not the only one.

Q. Who brought this dossier here?

A. From New York by Mr. Marosi.

Q. And was this paper with it when it was brought in the court?

A. I can't remember; I can't tell, I don't know, I just saw this

dossier and handed it to Mr. Garven, but I no look to see inside because I read it in my office, you know.

Redirect examination by Mr. GARVEN:

Q. You are sure it was offered at the hearing before Judge Blair in July?

A. Yes, sir.

Recross by Mr. EDWARDS:

Q. Who offered it?

A. I did.

Q. How did you offer it?

A. How do you mean?

Q. Did you say anything to Judge Blair when you offered it to him?

A. I don't remember what I said; I handed it to him.

Q. Did you not hand him anything else?

A. How? When do you mean?

82 Q. Or was it your assistant who did that. I mean at that same time you handed him this paper.

A. I remember I signed an affidavit for the extradition.

Q. You mean an affidavit for the arrest of the accused?

A. Yes.

Q. Has not your assistant, Monterosi had this document in your possession since you showed it to Judge Blair?

A. I don't understand that; had he had it in my possession?

Q. Has not your assistant Monterosi had this document since that time?

A. Marosi; He is not my assistant.

Q. Has he not had this in his possession for the Italian Consulate until it was presented to Judge Blair?

A. Until.

Q. Until and since?

A. No.

Q. What is his position in the office of the Consul?

A. Attaché in the Consulate, sent by the Italian Government.

Q. And he is an Italian citizen?

A. Yes.

Q. And so are you?

A. Yes.

(Paper offered in evidence again by the State.)

Mr. EDWARDS: It is objected to on the ground that it does not appear to have been regularly filed either with the Court or Clerk, or Judge, or with the Secretary of State; and that it is now formally presented for the first time and is not a file of this Court, and if it is to be filed it must be filed as of this date.

Mr. GARVEN: That is not true: We have had three hearings.

The COURT: I will admit the paper in evidence.

Mr. EDWARDS: We enter an exception.

(Paper marked S/2—J. M.)

Said exception is allowed and sealed. [L. S.]  
JOHN A. BLAIR, *Judge*. [SEAL.]

83 Mr. EDWARDS: I want to add another objection to S/2, on the ground that no application from the Italian Government for the issuance of this papers appears.

The COURT: The same ruling.

Mr. EDWARDS: And we extend our exception to that also.

Said exception is allowed and sealed.  
[SEAL.] JOHN A. BLAIR, *Judge*.

MICHAEL CABONI, called by the State and sworn according to law, testified as follows:

Direct examination by Mr. GARVEN:

Q. Are you connected with the Italian Consul's office in New York?

A. I am not.

Q. Were you employed by the Italian Government to translate the paper I show you here, and which is marked S/3 for Identification?

A. Yes.

Q. Did you translate it?

A. I did.

Q. To whom?

A. What do you mean by to whom?

Q. Did you translate it to any person or write it out yourself?

A. I wrote it myself; I wrote the translation myself.

Q. I show you a translation into English of this paper S/3 for identification and ask you whether it is a correct translation.

A. Is it correct? Well, I made it myself, and I think it is true.

Q. Is it correct or not?

A. It is true.

Cross-examination by Mr. EDWARDS:

Q. This is in typewriting?

A. Yes.

Q. Then you did not write it?

A. I wrote it in longhand and then I had it made in typewriting.

Q. Did you compare the typewriting with your hand-written copy?

A. Yes.

84 Q. And this is a correct typewritten copy of the hand-written copy that you made?

A. Yes.

Q. Are you an Italian?

A. Yes.

Q. A citizen of the United States?

A. Yes, I am naturalized.

Q. And you did this at the request of the Italian Consul?

A. Yes.

Q. Are you accustomed to make translations of Italian into English?

A. Yes: I translate for the National Association of Manufacturers of New York.

Q. And you are familiar with the Italian and English languages and translations?

A. Yes.

Q. And your translation covers the certificate and the dossier?

A. This certificate was written in English and I did not have to translate it.

Q. When did you make this translation?

A. I can have the dossier in the middle of July—last month.

Q. August?

A. August.

Q. What day was it given to you?

A. I say the middle; 13, 14 or 15.

Q. Who brought it to you?

A. I was invited to go to the Consul General's office, and the Consul General gave it to me, Mr. Farafuli.

Q. With the request to translate it?

A. Yes.

Q. How long did you have it in your possession?

A. Not a single day; I went every day to that office.

Q. How long did it take you to translate it?

A. About three weeks.

Q. When was it finished?

A. The fourth or fifth of this month, and then it took two or three more days to have it transcribed and finished.

Q. When was it finished?

A. Eight, ninth, or tenth.

Q. And when it was finished what did you do with it?

85 A. I brought it to the Consul.

Mr. GARVEN: And this is one of the copies?

WITNESS: Yes.

Q. And during all of the time of the translation you had it in the Italian Consul's office?

A. Yes; I translated it in that office entirely.

Mr. VICKERS: It is admitted that at the time of the presenting of this dossier the Italian Consul was to furnish the interpreter, by agreement, with Mr. Smith, representing the defendant.

Mr. EDWARDS: That is so.

Mr. GARVEN: We offer the dossier and the copy in English in evidence.

Mr. EDWARDS: We object to the same on the ground that the form signed "John J. Leishman, Ambassador of the United States of America to the Kingdom of Italy" is not in the form provided by the statute and the treaty and therefore is not sufficient and is void.

2. That this dossier was not filed within the forty days required

by the statute from the time of the arrest. The arrest took place, as we understand it, on June 24th. The papers were not filed, if they were ever filed, we claim that they were never duly filed and that they were not brought to this court until August eleventh, which is palpably beyond the forty days after the arrest, and therefore of no force or effect.

3. That it is not accompanied by the proper mandate or request from the Italian Government as required by the treaty.  
85 Mr. CLARKE: We add the further objection that there is not presented with this dossier the formal request called for by the amendment of 1884 to the treaty, and there is not presented with it the formal demand which is required by the latter sentence of that amendment to be filed within forty days with these documents, and that there is not presented with it the warrant or deposition required in the first section.

(Mr. Clarke proceeds with his argument to sustain these objections.)

Mr. GARVEN: I maintain that the certificate and all is in accordance with the law and the treaty, and that the continuance of the matter beyond forty days was by the consent of the defendant. That is all I want to say. It is a question for the court.

The COURT: I think I will admit the certificate as in proper form if you base the objection on the use of the word "use" instead of "receive."

To which ruling the defendant prays an exception and it is allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. GARVEN: The Court admits the dossier and the certificate in evidence?

The COURT: Subject to the question of the forty day clause.

Mr. GARVEN: I am offering that in evidence and if the court sustains that that is legal evidence.

Mr. CLARKE: I don't want to argue that question of the forty days now, because that will go to the entire case, and will rest on a particular paper which has not been produced.

87 Mr. GARVEN: We are offering this paper in evidence now.

The COURT: You may argue as to the admissibility of that paper, and then I will rule on it.

Mr. CLARKE: We claim that the dossier is not admissible without all the documents that are necessary to be presented within forty days. Among them is the formal demand for extradition from the Italian Government in addition to the preliminary requisition for arrest and this formal demand must be presented within the forty days as well as that the dossier shall be presented within the forty days. Article 5 of Treaty.

There must be a formal demand within the forty days, as well as a warrant and dossier;

There must be a formal demand within forty days from the arrest, and a warrant or depositions or dossier before the prosecution makes out a case.

This treaty provides forty days, although the Act of Congress provides sixty days. The treaty being later in point of time repeals the sixty day provision and makes it forty days for cases arising under it (Argument by respective counsel.)

The COURT: I will hold this question for the present and will allow you to proceed.

88 LOUIS S. WEINTHAL, called by the State and sworn according to law, testified as follows:

Direct examination by Mr. VICKERS:

Q. You reside in the City of Hoboken?

A. I do.

Q. Do you know the defendant in this case, Porter Charlton?

A. I do.

Q. When did you first see him?

A. On the North German Lloyd Dock, June 23.

Q. Did you speak to him?

A. I did.

Q. What did you say to him?

A. I asked him what his name was.

Q. What did he say to you if anything? in reply to that question?

A. He said his name was Coleman.

Q. Do you mean June 23 of this year?

A. Yes.

Q. Where was it that you saw this defendant and that you had the conversation with him that you have here related?

A. On the upper deck of the dock of the North German Lloyd Steamship Company in Hoboken.

Q. On the arrival of a steamer?

A. Yes.

Q. What name?

A. Princesse Irene.

Q. Sailing between what ports?

A. From Italy to America.

Cross-examination by Mr. EDWARDS:

Q. Did this man have any luggage with him?

A. A suit case—new suit case.

Q. How was that suit case marked—any name or letters on it?

A. No; No marks that I could see; I did not see any.

Q. Did you look inside of the suit case?

A. Not at that time; I was looking at it while the Government officials were examining it.

Q. Did you notice any clothes in it.

(Objected to as not proper cross-examination. Objection sustained.)

89 Q. You were a police officer?

A. Yes.

Q. You did not tell this man that you were a police officer, did you?

A. Not at that time.

Q. And you did not warn him about any statement he might make?

A. Not then.

Redirect examination by Mr. VICKERS:

Q. You were in citizen's clothes?

A. Yes.

The stenographer's record as to the admission in evidence of Exhibit S/1 is read by the stenographer at the request of the defendant's counsel.

Mr. Clarke and Mr. Edwards claim that it was only offered as a pleading and not as evidence and that it was consented that the copy in evidence be received in the place of the original.

Mr. Garven say- that the original would be evidence of the facts therein stated, and therefore the copy that is in its place is evidence of the facts.

The COURT: I will determine that hereafter.

The defendant excepts to any ruling that may be made to the effect that the complaint is evidence except of its having been filed as a complaint in this proceeding.

Mr. GARVEN: Will the court kindly pass upon the question of the admissibility of those documents, the dossier and the English copy of it? We are at a point where we will be compelled to have that question decided.

The COURT: I will permit you to use the dossier.

Mr. GARVEN: We ask a ruling on that question before the case is closed. It is marked now only for identification and we cannot close the case until we know whether it is in evidence or not; and the same is true with respect to the translation, also.

The COURT: I will look at the matter at recess.

We will take a recess now until a quarter of two o'clock.

Recess.

The COURT: I have reached the conclusion that this paper called the dossier will be admitted in evidence; and also the translation.

Mr. EDWARDS: We ask an exception on each and all the grounds which have been stated, and it is allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

(These papers are received and marked in evidence as S/3 and S/4.)

Mr. EDWARDS: Our exception, of course, goes to the admission of the translation as well, but we don't make any dispute as to the correctness of the translation.

The COURT: Yes.

Mr. EDWARDS: We object to the admission of the translation as well as of the dossier, and except to your Honor's ruling admitting either.

Said exception is allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]



Mr. GARVEN: In behalf of the Italian Government we close the case.

91 Mr. CLARKE: We make a motion to dismiss on the following grounds:

1. That while the mandate to the Secretary of State is produced, there is no proof of the form in which the original requisition for the preliminary arrest was made to the Secretary of State, nor is any copy of the original requisition proved, nor is the original requisition presented, and therefore there is no requisition proved before the court.

2. There is no proof that any copy of the warrant of arrest in Italy accompanied the original requisition for extradition, nor is there any proof of the copy of the warrant of arrest or of the warrant of arrest.

3. There is no proof that any depositions on which the warrant of arrest was issued in Italy accompanied the requisition, nor any proof that any copy of the depositions on which the warrant of arrest issued in Italy accompanied such requisition.

4. There is no proof that any formal demand for extradition supported as above provided for, together with the documents above provided was made within forty days after the arrest, nor proof of any formal demand for extradition as required by the treaty and the act of Congress.

5. There is no proof that any copy of the depositions on which the warrant of arrest was issued, or the warrant of arrest, was presented to the Secretary of State and presented to the Court within the forty days required by the law and the treaty or either; and that the complaint is not evidence of the facts in question and on its face shows no compliance with the statute or the treaty.

6. That the burden of proof is on the prosecution in a proceeding of this kind to show that all the requirements of the treaty  
92 have been complied with, and that such documents should be presented within the time required to the Secretary of State or to this Court, and they should be presented to the Secretary of State and by him filed and entered and forwarded to this Court for action; and that the prosecution has not made such proof and the documents have not been presented to this court or to the Secretary of State within the forty days required by the treaty.

7. That the documents required by the treaty have not been duly filed, made, entered or received by the United States Government, executive or judicial, within the forty days required by the treaty of 1884.

8. That the treaty does not include citizens of the asylum countries by reason of the various actions of the diplomatic departments of the two governments, and by reason of the Italian statute, and so on, which will be proved as part of the defendant's case.

The COURT: I deny the motion.

Mr. EDWARDS: We take an exception on each and every ground above stated.

JOHN A. BLAIR, *Judge*. [SEAL.]

Said exception is allowed and sealed.

Mr. EDWARDS: We propose to produce in evidence some matter going towards the treaty and the statutes, and the court's duty thereunder, by showing that the Italian Government has denounced the treaty; that they have put upon it for a long series of years a construction to the effect that only persons who are not citizens of the asylum country can be extradited under it, and that the Government of the United States must put the same construction on it, and that it has thus actually been renounced and is no longer in force so far as concerns citizens of the asylum country.

93 In addition to this we propose to show, as a reason why the extradition should not be granted, that on the day of the date of the commission of the crime in Italy the prisoner Porter Charlton was of unsound mind to such extent that he was unable to distinguish between the right and wrong of the deed for which he has been committed; in other words, that under our law he was insane and continued in that condition of mind up to the time of his arrest. And we propose to give expert evidence on that subject, and other evidence in support of the expert evidence as to his previous life, and physical antecedents and ancestry.

We submit that we should put in the documentary evidence last and the insanity evidence first, as the witnesses are here

We call Paul Charlton.

(Objected to.)

Mr. EDWARDS: We offer to prove by the testimony of Mr. Paul Charlton, the father of defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime, in the month of June, in Italy, this defendant was of unsound mind, that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit: that at the time of the doing of the act complained of this defendant was of such unsound mind and  
94 was so insane as to be unable to distinguish between the right and the wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

Mr. GARVEN: It is quite evident that counsel has admitted the commission of the crime by Porter Charlton.

We object to this witness testifying to the insanity of the defendant on the ground that your Honor is sitting merely as a committing magistrate, and under the law of this State a committing magistrate will not allow the defense to go into the case on a preliminary hearing on a complaint, except that the defendant might make a statement, not under oath.

And secondly, that it is inadmissible to plead insanity in this proceeding.

And on those grounds we object to the evidence.

Mr. EDWARDS: We submit that it would be a deprivation of our rights not to hear our evidence now; and that it would be an improper thing and illegal to surrender to the Italian Government a citizen of the United States who at the time of the commission of the offense was and is now insane.

Mr. GARVEN: This court has nothing to do with the surrendering of the man. I call attention to the Wach (?) case, in which Judge Brown gave the opinion. In this state, where a *prima facie* case is presented by the State before the committing magistrate, he holds for the grand jury; and the law in that case governs this case, and it seems to me that outside of the statement by the defendant himself the Court cannot hear any evidence. We do not object to a statement by the defendant.

Mr. CLARKE: The first question here is whether we are proceeding under state law or United States law.

95 A number of cases hold that the defense can introduce evidence, and other cases hold that the defense cannot do so; but it seems to us that the whole matter is set at rest by the statutes of the United States, Act of August 3, 1882, Section 3. There is a statutory direction there that even the cost of summoning witnesses for the defense shall be paid by the United States. And that shows that the defendant has the right to call and examine witnesses.

22 U. S. Stat. at Large, 215.

The COURT: The statute says "may."

Mr. CLARKE: The word "may" has been held to mean "must." That has been held in many cases, most frequently in the matter of costs. But this statute of 1882 expressly recognizes the propriety of a defense and provides for the proceeding.

See *Orteaza vs. Jacobus*, 136 U. S. 330,

And other cases with further argument on the law from Mr. Clarke not set forth here, as to whether evidence of insanity is admissible; if he is insane he is not before this court and cannot be extradited. It is a proper defense.

See the Catlow case.

I may say, in this connection, that I understand from the form in which the objection is made by the learned District Attorney, that any further elaboration by us of the facts of hereditary or family history and surrounding conditions affecting defendant's mind on which the hypothetical question as to insanity was to be based, and the precise form of the offer, is waived, the point insisted upon by my friend being simply that evidence of the insanity of the defendant is not inadmissible.

96 Mr. VICKERS: So far as the insanity of this defendant is concerned.

Mr. CLARKE: So far as the insanity of the defendant is concerned.

The COURT: Do you suppose, Mr. Edwards, that if I were sitting as a committing magistrate on the charge of murder that the defendant would have a right to set up a defense of insanity?

Mr. EDWARDS: Not if he were being held according to our State law.

The COURT: Is not the law that is to govern, the law of this State?

Mr. EDWARDS: No; he must be tried according to the law of the country in which he is found; that includes the United States.

Thereupon while said court was still sitting upon said day in the hearing of the above matter, Mr. Edwards, of counsel for the defendant, called a witness on behalf of the defendant to testify as to certain facts material to the defense in said proceeding, said witness being competent by age and knowledge to give such testimony, and being then physically present in said court, and being presented at the bar of said court to be sworn, for the purpose of giving such testimony; and, before such witness was sworn, as above, an objection having been interposed on the part of the State to the introduction of any evidence of the insanity of the defendant.

97 And counsel for the defendant having stated orally, at the bar of the court, that he proposed to offer by the testimony of the witness then at the bar of the court and offered to be sworn, and by the testimony of other witnesses then physically present in the court, competent by age, experience and knowledge, and ready to be sworn, and to testify in this proceeding, and by this testimony to prove that the defendant, at and before the time of the offense alleged to have been committed by the defendant was committed, and at the time of the arrest of the defendant in Hudson County, New Jersey, to wit: on June 23rd, 1910, and at the time said offer was made, to wit: on September 21st, 1910 the said defendant was, and is, insane, and irresponsible, for his acts, and further offered to prove by the testimony of Paul Charlton, the father of the defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime in the month of June in Italy, this defendant was of unsound mind, that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit: that at the time of the doing of the act complained of this defendant  
98 was of such unsound mind and was so insane as to be unable to distinguish between the right and wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

And the court, at said place and upon said date, having duly considered said offer of testimony on behalf of defendant, and the objection to the reception thereof, interposed on behalf of the State, having sustained the objection, and declined to permit the introduction thereof, or the production and swearing of said witnesses on behalf of the defendant, as to such facts or any of them; to which action and ruling of the court due exception was made by counsel

on behalf of the defendant, and such exception having been duly noted on the records of the court; allowed and sealed.

JOHN A. BLAIR,  
*Judge.* [SEAL.]

And the court having granted, in open court, permission for counsel for defendant to present a statement and schedule of the facts so offered to be proven, on behalf of defendant, by said witnesses who were then physically present in court, and competent, ready and willing to testify thereto, in compliance with said permission, there is submitted for insertion in the records of this court, in the hearing of this case, a statement and schedule of the said facts so offered to be testified to, introduced and proven on behalf of the defendant, as follows:

99 That the defendant was born, and now is, an American citizen; that he was born at Omaha, Nebraska, within the United States, on September 21st, 1888; that at the time of his birth both his father and his mother were American citizens; as a child he was normal, physically and mentally, and although physically very active and adroit, apt and skillful as an athlete, he was never physically robust or strong.

As a child his temper was usually good; he was amiable, gentle, fond of company, of his family and his companions, and was well liked by every one. From his early childhood he was subject to fits of extreme rage, upon provocation and infrequently. On one occasion, when he was of the age of fourteen years, the horse he was riding took fright and ran away with him, and when he brought the horse in both horse and rider were in a state of complete exhaustion—the horse from overriding and from laceration of his mouth by a severe bit, and of his sides and flanks from severe and cruel spurring. The boy was in hysterical rage, trembling violently and crying, and begging to be allowed to take further vengeance upon the horse, because he had been unruly, and he had to be taken from him by force. Later, during his life in boarding school, on occasions of athletic contests on several occasions he became violently enraged, and required to be restrained by force from committing reprisals on his opponents. He had, during all his life spent much

time in outdoor sports and exercise, until he came to New  
100 York in December, 1908, and took a place in a bank, where his duties soon became so onerous as to require (in his judgment) constant application at a desk from 9 A. M. to 6 P. M., and frequently until midnight, and this usually for the whole seven days of the week. In September, 1909, his associates and family began to notice a radical change in him. He became very thin, his face was grey and drawn, his temper became uncertain, and he was resentful of suggestion or control to the verge of extreme rudeness; generally the change from evenness and courtesy was so pronounced as to be noticed by everyone with whom he came in contact. This change, in those regards, became more and more pronounced, until he was insubordinate to the directors of his employers and repudiated the suggestion or control of his father, or the advice of his brother

and friends. He became solitary, morose, uncommunicative. When he left his work he would lock himself alone in his lodgings, and would read works of the imagination and poetry. He ceased to visit friends, and refused offers and invitations for entertainment in their company.

Early in the year 1910 he developed a persistent, hacking cough, expectorated almost constantly, his shoulders were drawn in, he was stooped and emaciated. He ridiculed, with resentment the endeavors of his family to induce him to take medical advice, and to take exercise in the open air, and reduce his hours of work. His condition became alarmingly worse between his father's visits to him, on February 1st and March 6th, 1910: on the latter date he was in a state approaching physical collapse, his breathing was oppressed, and his sputum tinged with blood. He was put to bed, and consented to consult a physician the next day. After examination, it was found, from his sputum and an X-ray photograph, that he was suffering from incipient tuberculosis, and he was advised that life in the open air, with practically hospital surroundings, would be necessary to save his life. Arrangements were at once made for the termination of his employment on April 1, and permission had been obtained for his admission to the tuberculosis hospital of the United States Army, at Ft. Bayard, New Mexico, to which he gave ready assent.

Coming to New York to see him to make final arrangements, his father met him at the 23rd St. Ferry and told him he was in a great hurry to keep a dinner engagement. On the way from the ferry in a cab, he told his father that he had been privately married, on March 12th, 1910, to a woman slightly older than he, who had been forced to divorce her husband, but who was the brightest, prettiest, most charming lady in the world.

Instead of driving to the place of his father's engagement, the cab was driven to "The Woodward Annex," an apartment hotel at 55th Street and Broadway, where the defendant and his wife, Mary Scott Castle Charlton, were then living. Mrs. Charlton was, apparently at least twice the age of her husband, was vivacious, and had the appearance of intense vitality, in marked contrast to her husband, who was stooped, with drawn face, a constant irritating cough, and was noticeably under the domination of his wife. After a short interview, the father proceeded to his engagement, and returned to the hotel about midnight.

At the interview which followed the father made respectful inquiry of the wife in relation to her family, her life and career, including her former marriage, which had been dissolved by divorce, and also as to the resources of the husband and wife, the husband having no private means,—except as furnished by his father—and being out of employment.

These natural and necessary questions were resented by the wife and the interview terminated in about half an hour in her withdrawal with her husband, in a highly hysterical condition. Offers of assistance by the father were refused, in violent words by the husband and wife.



Similar offers were refused on the following morning as were invitations by telephone from the father to the wife and husband to lunch and dine with him on that day.

Mr. and Mrs. Charlton did, however, dine on the evening of March 29, 1910, at the Hotel Lafayette, 9th St. and University Place, with the father and a gentleman friend, at which time the wife drank without moderation, white wine, and after dinner, furnished at her request, two large goblets of "dropped absinthe" in ice.

The father did not again see Mr. and Mrs. Charlton, or either of them, prior to their sailing from New York for Genoa on the SS. "Duca D'Aosta," on Saturday, April 16, 1910.

The father did, however, receive from his son on or about April 6, 1910, a letter so full of foulness and abuse that the father destroyed it unread, except a glance through it to see its purport and phraseology.

The latter were entirely unlike any diction, oral or written, that the son had ever been known to use; he had hitherto been a purist in the use of language, and extremely refined in both conversation and correspondence, while the letter was full of phrases of the gutter, such as would be used by the most abandoned person. Aside from abuse of the father the letter contained the most extravagant eulogies of the wife.

A similar letter, equally strange and foul, was received by the father from the son in Italy about May 16th, 1910, which was likewise destroyed unread except for a glance to learn its purport and phraseology, which like that of the former letter, was abusive, foul, insulting and utterly, radically, different in those qualities, and in its rambling incoherence, from anything his father had ever known him speak or write. Both the letters bore convincing internal evidence of having been dictated rather than originated by the writer.

He wrote two similar letters to one of his brothers—one before he sailed for Italy and one on or about May 18th, 1910, both full of abuse of his family and eulogies of his wife. Both these letters were destroyed after being glanced over to see if they contained and important statement as to his health or plans, which neither of them did.

These were the only communications received by his family after he sailed for Italy and up to the day of his arrest at Hoboken on June 23rd, 1910. His father saw him at Police Headquarters, Hoboken, N. J., on the night of his arrest; when there were also present: Mr. Hayes, Chief of Police; several officers, Recorder McGovern, by whom he had been committed; Dr. William J. Arlitz, the police surgeon, R. Floyd Clarke, Esqre., his counsel, and  
104 Robert Charlton, his brother.

On this occasion he was in a state of hysterical exaltation; he refused to greet or speak to his father; had no apparent appreciation of the gravity or seriousness of his situation; was incoherent in his statements, and talked freely in a rambling, disconnected manner to all the persons present, and was palpably, to any observer, not of sound mind.

When he arrived at the dock in Hoboken he left the steamer,



carrying two suit cases, one of which was marked with the initials "P. C.," and submitted them to the examination of the customs officials, although they contained toilet articles and wearing apparel marked with his name or initials, letters addressed to him, and visiting cards bearing his name.

His demeanor at the time of his arrest, preliminary examination, etc., was such as to convince the Police Surgeon, that he was demented.

#### *Family History of Porter Charlton.*

1. The maternal grandfather of defendant died at the age of between 35 and 40 years, of chronic alcoholism;

2. The brother of the foregoing (No. 1), was a paranoic for years before his death and died in that condition.

3. The sister of the foregoing (Nos. 1 & 2), was a daughter afflicted with epilepsy, who died in epileptiform convulsions at the age of about 32.

4. The maternal uncle of defendant, now 51 years old, is of a stubborn and brutal nature; was educated as a chemist; became a pharmacist; wasted his estate on a low connection with a woman much older than himself; contracted drug habits; and has lived an eccentric and immoral life since the age of 21 years; untirely cut off from associates of his own class.

5. A near relative of his mother's blood, now living, has had periodic explosions of attacks of epilepsy for many years.

6. A younger brother of defendant, at the age of 15 years, accidentally shot and killed a playmate to whom he was devotedly attached, but after his first paroxysm of grief—within three days—seemed to forget the accident; never referred to it; has since gone about his daily life as if it had not happened, and, so far as can be observed, has remained indifferent.

#### *Some Medical History of Mary Scott Castle Charlton.*

1. Within three years was confined to an institution in the City of New York, suffering from erotic insanity—uncontrollable desire for the society of men.

2. Within two years last past, and up to the time of her departure for Italy, was under the treatment of two physicians of the City of New York for alcoholism, and uncontrollable, hysterical outbursts of rage. On learning of her proposed marriage to defendant both physicians endeavored to have disclosure of these facts made to defendant, but were unsuccessful. The foregoing is important and material, as explaining the physical and mental condition of the defendant as disclosed to the alienists who have had him under observation since his arrest.

Defendant has been under the observation of Dr. William J. Arlitz, Hoboken, New Jersey, from the hour of his arrest on June 23, 1910; and of Drs. Allan McLane Hamilton and Edward D. Fisher since June 24, 1910:

They have, singly and together, made frequent and exhaustive examination of the mental and physical condition of the defendant from the above dates until the present, and they are unanimously and strongly of the opinion that, at the date of the crime alleged to have been committed by the defendant, and at the date of his arrest in the United States, and at the present date, the defendant was and is, suffering from an exhaustive psychosis due to sexual excesses; that his moral sense is pathologically defective; that he is of unsound mind and liable to attacks of impulsive violence, which explosions are beyond his control and are due to hysterical stigmata and epileptiform seizures, during which he was not and is not responsible; that his whole condition shows a degree of weakmindedness, disregard for his personal safety, and liability to violent explosion at any time, which is to be looked for in a person of his constitutional mental weakness.

The said expert physicians and alienists who have examined the defendant since he has been in custody will depose that in their opinion this defendant, at the time of the commission of this alleged crime in the month of June in Italy was of unsound mind, and that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and that in their opinion, conforming with the tests of responsibility laid down by our courts, this defendant at the  
107 time of the doing of the act complained of was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of the act, and that this condition existed some time previous to the commission of the alleged crime and continued up to and including the time when he was arrested.

These physicians recommend that he should be taken to a hospital for the insane, and there kept indefinitely, as he is at any time likely to be a menace to society.

The defendant, by his counsel offers to prove the facts, and each of them, set forth in the preceding schedule or statement, by the competent, relevant and material testimony of witnesses now physically present in court, and qualified by age, knowledge, and experience to testify to the same, and each of said facts, and to the results and conclusions and opinion necessarily and legally following therefrom.

Thereupon the Court ruled:

The COURT: I have reached the conclusion, on the subject of insanity as a defense in this matter that I will not hear it. I do not think we ought to go into the subject of the insanity of the defendant, and therefore over-rule the offer of the defense.

Exception taken by defendant, and allowed and sealed.

JOHN A. BLAIR, Judge. [SEAL.]

Mr. EDWARDS: It is conceded that the defendant was at the time of the alleged commission of the alleged crime and is now and was at the time of his arrest, an American citizen.

Mr. GARVEN: Yes, we agree to that.

Mr. CLARKE: I desire to prove by "United States Foreign Relations" of 1890, certain documentary evidence in regard to the diplomatic correspondence between the United States and Italy in regard to the construction of this treaty.

Volume of Congressional Record of 1890, page 555, the letters of Baron Fava and of Mr. Blaine. Copies will be furnished.

(Objected to as irrelevant and immaterial in this hearing as to what construction the State Department or other Department has placed upon the treaty.)

Mr. CLARKE: The object of the offer is to show the international situation in regard to this treaty. We wish to prove in connection with the treaty the interpretation placed upon it by the parties. The letter is after the making of the treaty; and we wish to show what attitude each Government to the treaty has assumed.

The COURT: I think I will hear it. I am inclined to have you put that in. If it was not in it would be useful in argument, anyway.

Mr. GARVEN: Our position is that the treaty and extradition acts speak for themselves; and it seems to me that this correspondence should have no bearing as to how the committing magistrate should construe the treaty and that act.

Mr. CLARKE: The letter of Baron Fava to Mr. Blaine, Secretary of State, is dated April 20, 1890, and is at pages 555 et seq. of the "Foreign Relations of the United States of 1890. (A copy is presented and admitted in evidence, and marked "Defendant's Exhibit A.)

Mr. Blaine's letter as Secretary of State to Baron Fava, Italian Minister, is June 23, 1890, in the same volume, pp. 559 to 566 inclusive. (A copy is presented and admitted in evidence and marked "Defendant's Exhibit B.")

Baron Fava to Secretary of State Blaine, July 3, 1890, idem. 567, (a copy is presented and admitted in evidence and marked "Defendant's Exhibit C.")

The important part is simply in regard to the case of Salvatore Palladina, which occurred in 1888. He committed a murder here and fled to Italy, and his extradition was then demanded and refused; but it first appears in the diplomatic correspondence in 1890, in the case of Bevivino and Villela.

We submit, also the case of Del Zoppo & Dinaldi, "Foreign Relations of 1894," pages 370, 371, 373, letters from McVeagh, Secretary of State, To Gresham, April 10, 1890. A copy is presented and admitted in evidence, and marked "Defendant's Exhibit D."

Also the Di Blasiv case, which is here in manuscript. I offer in evidence the letter of Edwin F. Uhl, Acting Secretary, dated February 18, 1894.

(Letter admitted and marked "Defendant's Exhibit E.")

Letter of John Hay, Secretary of State, to the Governor of Massachusetts, February 11, 1899—here also in manuscript.

(Letter admitted and marked "Defendant's Exhibit F.")

Said exhibits are all attached and marked as stated.

The said defendant's Exhibit E is here inserted and reads as follows:

110

## DEFENDANT'S EXHIBIT E.

Copy.

DEPARTMENT OF STATE,  
WASHINGTON, *February 13, 1894.*

His Excellency the Governor of the State of New York, Albany,  
New York.

SIR: Referring to the Department's telegram of the 27th ultimo, I have the honor to enclose herewith for your fuller information, a copy of the reply of the Italian Minister of Foreign Affairs to the request of this Government for the provisional arrest of the fugitives Delzoppo and Rinaldi.

The concluding paragraph of the minister's note indicates that the Italian Government will not surrender the fugitives but will try them in Italy. This is in accordance with their action heretofore when the extradition of Italian subjects has been requested.

I have the honor to be, Sir,

Your obedient servant,

(Signed)

EDWIN F. UHL,  
*Acting Secretary.*

Enclosure: Copy of Enclosure No. 3 with No. 161, Jan. 26, 1894, from the Minister at Rome.

Said defendant's Exhibit F is here inserted and reads as follows:

## DEFENDANT'S EXHIBIT F.

Copy.

DEPARTMENT OF STATE,  
WASHINGTON, *February 11, 1899.*

111

His Excellency the Governor of Massachusetts, Boston, Massachusetts.

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant relative to the extradition of the alleged murderer Di Blasi, whose provisional detention at Palermo, Sicily, this department recently asked at your request.

As it appears that Di Blasi is an Italian subject the Department is of the opinion that it would be useless to incur the expense of sending an officer to Italy to endeavor to secure his return. Our extradition treaty with Italy provides for the surrender of "persons"

charged with crime, and no express exemption is made of citizens. This Government has taken the view that where no exception is expressed, in the treaty the obligation to surrender "persons" includes citizens or subjects of the contracting parties. The Italian Government, however, declines to accept this view, and uniformly refuses to surrender its subjects, usually accompanying its refusal with an offer to try and punish the fugitives in Italy, as may be done under Italian law.

I have the honor to be, Sir,

Your obedient servant,  
(Signed)

JOHN HAY.

Mr. CLARKE: I now produce the Italian Penal Code, and offer it in evidence, and offer the title page "Code Penale," and the proclamation under which it was proclaimed, dated at Rome, June 30,

1889, to take effect on the first day of January, 1890, and  
112 refer particularly to Article 9 of that code, the first phrase of which article, when translated, means, "No Italian citizen shall be extradited."

The same is marked "Defendant's Exhibit G," and is annexed.

And the following, omitting the title page and proclamation, is an extract from Exhibit G, giving the Italian text of Article 9 of the Code and translation thereof, inserted as follows:

"First Book.

Libro Primo.

Dei reati e delle pene in generale.

Titolo I.

Dell' applicazione della legge penale.

. . . . .  
. . . . .  
. . . . .

9. Non e ammessa l'estradizione del cittadino.

L'estradizione dello straniero non e ammessa per i delitti politici, ne per i reati che a questi siano connessi.

L'estradizione dello straniero non puo essere offerta ne consentita se non dal governo del Re, e previa deliberazione conforme dell'autorita giudiziaria del luege in cui lo straniero si trovi.

Nondimeno, su domanda od offerta di estradizione puo essere ordinate l'arreste provvisorio dello straniero.

. . . . .  
. . . . .

*Translation of above.*

*"First Book.*

**First Book.**

**Concerning Crimes and Penalties in General.**

**Title I.**

**Of the Application of the Penal Law.**

. . . . .  
 . . . . .

9. The extradition of a citizen is not permitted (conceded-am-messa).

The extradition of an alien is not permitted (conceded-am-messa) for political offenses, nor for crimes connected with political offences.

The extradition of an alien can neither be offered nor granted except by the Government of the King, and after previous deliberation in conformity with the judicial authority of the place in which the alien is found.

However, upon demand or offer of extradition, the provisional arrest of an alien may be ordered.

. . . . .

Mr. GARVEN: All of the Code is objected to as immaterial and irrelevant, but objection is not made to the manner of proof nor to the authenticity of the volume.

The COURT: The Code may go in evidence.

(Code received in evidence as Defendant's Exhibit G, and is annexed.)

Mr. EDWARDS: It is admitted as follows: Porter Charlton, the defendant, was born at Omaha, Nebraska, September 21,  
 114 1888; he was born of American parents, American ancestry, all citizens of the United States; he is a citizen of the United States, and voted in the mayoralty election in New York City in the election of November, 1909.

Mr. GARVEN: No. We claim there is no defense here, and therefore there can be no admission, but we allow the offer to go on record, and the facts are not disputed.

Mr. EDWARDS: Let us get it right. Counsel for the defendant states the following facts: Porter Charlton was born in Omaha, Nebraska, September 21, 1888, both of his parents were American citizens; he is a citizen of the United States and of the State of New York; he voted in the mayoralty election in New York City in November, 1909. Further proof beyond this statement is waived, but the State insists that the facts are irrelevant and immaterial.

The COURT: Is there anything further?

Mr. EDWARDS: That is our case, and we ask now, on the grounds now stated, for the discharge of Mr. Charlton.

Mr. CLARKE: We move to dismiss on the following grounds.

1st. That while the mandate of the Secretary of State is produced, there is no proof of the form in which the original requisition for the preliminary arrest was made upon the American Government, nor is there any copy of such original requisition presented.

2nd. There is no proof that any copy of the warrant for his arrest in Italy accompanied the original requisition for extradition nor is there any proof of any copy of any such warrant, or  
115 of the warrant of arrest.

3rd. There is no proof that any copy of the depositions on which the warrant of arrest was issued in Italy accompanied the requisition, nor any proof that any copy of the depositions on which the warrant of arrest issued in Italy accompanied such requisition.

4th. There is no proof of any formal demand for the extradition of Porter Charlton, supported as above provided, and together with the documents above provided, was made within forty days after the arrest, or was made at any time prior to this hearing, nor is there any proof of any formal demand for the extradition of Porter Charlton as required by the treaty and the Act of Congress.

5th. There is no proof that any copy of the depositions on which the warrant of arrest was presented to the Secretary of State or presented to this Court within the forty days required by the treaty, or up to the time of this hearing, and that the complaint is not evidence of any of the facts stated in it and in any event, on its face shows no compliance with the requirements of the statute or the treaty.

6th. That the burden of proof is on the prosecution in a proceeding of this kind to show that all the requirements of the treaty have been complied with and that all such documents have been presented within the time required to the Secretary of State or to this Court, and that such documents should be presented to the

Secretary of State and by him forwarded to this Court for  
116 action, and that the prosecution has failed to show or make proof that any such documents have been presented to this court or to the Secretary of State within the forty days required by the treaty, or up to the time of this hearing.

7th. That the documents required by the treaty have not been duly filed, made, entered or received by the United States Government, executive or judicial, within the forty days required by the treaty of 1884, or according to the treaty.

8th. That the treaty does not include citizens of the asylum countries by reason of the various actions of the diplomatic departments of both governments, and by reason of the Italian statute, Article 9 of the Penal Code of 1890.

9th. That Charlton, being a citizen of the United States, under the diplomatic correspondence which has taken place between the two governments respecting the construction of the treaty and of Article 9 of the Italian Penal Code of 1890, the treaty, so far as it



applied to citizens of the asylum country, has been denounced and broken by Italy, and under the circumstances there is no jurisdiction in the Courts or the Executive to extradite, there being no obligation, under the treaty, to extradite.

Mr. CLARKE: And on the further ground that the treaty does not apply to citizens of the United States and that the court has no jurisdiction because of that fact, we ask his discharge for those reasons.

The COURT: I ought, perhaps, to examine into the question that is raised by the correspondence in reference to this treaty.

117 Mr. CLARKE: In respect to the power of the Secretary of State or of this court to extradite under the circumstances which have arisen under this treaty I desire to be heard fully. Does your Honor desire to hear me now?

Mr. GARVEN: I ask your Honor to hold that the evidence here is sufficient to sustain the charge, and that you issue a warrant for the commitment of Porter Charlton to the jail, there to remain until such surrender is made as provided by the statute.

I presume the defense has no further testimony in this case?

Mr. EDWARDS: Nothing further.

Testimony closed.

Mr. CLARKE: I will now proceed with my argument on the case.

(Mr. Clarke goes on with his argument, and Mr. Garven answers the argument, and Mr. Clarke replies.)

Hudson County (New Jersey) Court of Oyer and Terminer.

STATE

VS.

PORTER CHARLTON.

*Extradition Proceedings.*

FRIDAY, October 14th, 1910.

This matter came on before Honorable John A. Blair, Judge, sitting as a committing magistrate, in the Court House in Jersey City, on this fourteenth day of October, nineteen hundred  
118 and ten.

Mr. Pierre P. Garven, Prosecutor of the Pleas of Hudson County, and Mr. George T. Vickers, First Assistant Prosecutor of the Pleas of the said county, appeared for the State.

Mr. William D. Edwards and Mr. Edwin F. Smith appeared for the accused.

The prisoner, Porter Charlton, was brought to the bar of the Court by the sheriff.

The COURT: The matter of the proceedings in respect to the extradition of Porter Charlton is before me for decision. I will now dispose of this matter. My findings and conclusions are as follows:

It is either proved or admitted that Porter Charlton, the accused,

is an American citizen; that in March, 1910 he married Mary Scott Castle; that on the tenth day of June, 1910, the body of the wife of the accused was found, in the waters of Lake Como, in Italy, murdered; that on the arrival of the North German Lloyd steamship "Princess Irene" in Hoboken on June 23rd, 1910, the accused was arrested upon complaint of Gustafo Di Rosa, Vice-Consul of the Italian Government in New York, charged with the murder of his wife, and is now and has since that time been confined in the Hudson County Jail, and that the Italian Government has made requisition upon the United States Government for his extradition.

The present proceeding is the hearing on said complaint for the detention of the accused pending further action by the Department of State of the United States, and on behalf of the defendant for his discharge and release upon the following grounds:

119 1. That there is no legal and sufficient evidence to hold him in restraint; and,

2. That the treaty between the governments of the United States and Italy, under which he is sought to be extradited, was not originally applicable to the case of the accused; or, if it was applicable, diplomatic correspondence since had between the two governments has made the treaty void and inapplicable to the case under consideration.

The Court in this case sits as a committing magistrate, to determine whether the evidence sufficiently established the probable guilt of the accused, and his powers as such are well defined in the case of *Benson vs. Mahon*, 127 U. S. Rep., 457, in which Mr. Justice Miller says:

"Taking the provision of the treaty, and that of the Revised Statute 5270, we are of the opinion that the proceeding before the Commissioner, or Committing Magistrate, is not to be regarded as in the nature of a trial by which the prisoner could be convicted or acquitted, of the crime charged against him; but rather of the character of those preliminary examinations which take place every day in this country before an Examining or Committing Magistrate, for the purpose of determining whether a case is made out which would justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceedings on which he shall be finally tried upon the charges made against him."

Acting within the rule thus laid down, the Court finds that there is such evidence of criminality presented to it, as, according to the law governing this matter, justifies the holding of the accused; and the motion to discharge on the ground of insufficiency of evidence, is, therefore, denied.

120 The motion to discharge is urged on the further ground that the extradition treaty between the governments of the United States and Italy, if ever applicable to this case, is not so now, by force of the diplomatic correspondence of the Secretaries of State of the respective governments presented to the Court, and by a Legislative act of the Italian Government, known as the "Code Penale,"

passed subsequent to the making of the treaty, that "No Italian citizen shall be extradited."

Considering the grave character of the charge, and the international importance of the question involved, the Court is not willing, upon that ground, in this preliminary inquiry, notwithstanding the able and ingenious arguments of counsel to declare void a solemn treaty between the interested nations; and the motion to discharge is refused.

The accused will be remanded to the County Jail, there to remain until released in the manner provided by the statute.

Mr. EDWARDS: We desire to enter an exception to the findings of your Honor on each of the two grounds, and to your decision thereon. We ask for an exception on each ground.

Exception allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. EDWARDS: We also except to the refusal of the Court to discharge the accused on each of the nine grounds for dismissal above set forth.

Exception allowed on each ground.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. EDWARDS: A ruling is now requested upon the point reserved by the Court as to Exhibit "S1."

121 Judge BLAIR: I will admit the copy of the Exhibit 'S1' as proof of the fact that a complaint was made. I do not admit it as evidence or proof of the facts therein sworn to.

JOHN A. BLAIR, *Judge*. [SEAL.]

The following commitment was signed by Judge Blair and the prisoner, Porter Charlton, was thereupon removed by the Sheriff.

#### Hudson Court of Oyer & Terminer.

In the Matter of the Application of PORTER CHARLTON under the Treaty Between the United States of America and the Kingdom of Italy.

HUDSON COUNTY, ss:

[SEAL.]

The State of New Jersey to the Sheriff and Constables of the County of Hudson:

We commend you that you take the body of Porter Charlton, against whom a complaint is made under oath, charging said Porter Charlton, being found within the limits of the State of New Jersey, with having, on or about the 7th day of June, A. D. 1910, at Moltrasio, in the Kingdom of Italy, committed the crime of murder upon his wife, Mary Charlton, within the jurisdiction of the Kingdom of Italy; and evidence of criminality having been heard before me and by me considered; and upon the said hearing

sufficient evidence having been presented to sustain the charge, under the provisions of a certain Treaty between the Governments of the United States of America, and of the Kingdom of Italy; and you are commanded him to convey to the keeper of the Common Gaol of the said County of Hudson who is hereby required him  
 122 safely to keep until he shall be surrendered to the Kingdom of Italy, under warrant from the government of the United States, or until he be thence discharged by due course of law.

Witness: Honorable John A. Blair, one of the Justices of the Court of Common Pleas, in and for the County of Hudson, and in the absence of a Justice of the Supreme Court, sitting in and holding said Court of Oyer and Terminer.

JOHN A. BLAIR.

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EXHIBIT S. 1.

In the Matter of the Application for the Extradition of PORTER CHARLTON under the Treaty Between the United States and the Kingdom of Italy.

To the Honorable John A. Blair, one of the Judges of the Court of Oyer and Terminer in and for the County of Hudson, State of New Jersey:

Gustafo Di Rosa, Vice-Consul for the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, being duly sworn deposes and says, upon information and belief:

First. That one Porter Charlton did heretofore to wit: on or about the seventh day of June, nineteen hundred and ten, at Moltrasio, in the Province of Como, in the Kingdom of Italy, one Mary Charlton did wilfully feloniously and of his malice aforethought kill and slay, by striking, beating and wounding the said Mary in and upon the head and body with a certain mallet held by him the said Porter Charlton, thereby and therewith beating the — Mary into unconsciousness and insensibility from which she did not recover consciousness before the body of her the said Mary was placed by the said Porter Charlton into a trunk, which he the said Porter Charlton threw from a certain dock into a lake known as Lake Como.

And that deponent has obtained his information from telegrams, letters, cablegrams and other correspondence from the Secretary of the Interior of the Kingdom of Italy addressed to the Consul General of Italy of this jurisdiction and further from a statement made by the said Porter Charlton and taken down in writing and signed by him in the presence of witnesses, which said statement is in effect and of the following tenor to wit:

CITY OF HOBOKEN,  
*County of Hudson,*  
*State of New Jersey:*

STATE  
vs.  
PORTER CHARLTON.

The Voluntary Examination of the Above-named Defendant, Porter Charlton, Charged with — Fugitive from Justice, Taken Before Me, Patrick Hayes, Jr., Chief of Police of the City of Hoboken, After the said Defendant Has Been Duly Cautioned as to His Rights and Privileges.

My name is Porter Charlton. I live at 204 West 55th St. N. Y. City, I am 21 years of age; I was born Omaha, Neb.; I am married; My occupation is bank clerk. In reference to the charge made against me;

My wife and I lived very happily together. She was the best woman in the world to me. But she had an ungovernable temper and so had I. We frequently quarrelled over the most trivial matters and her language to me was very foul, language that I know she did not — the meaning of, I am sure. The night I struck her, she had been quarrelling with me. It was the worst temper I ever saw her in. I told her that if she did not cease, I would put a stop to it. She quit for a while and after a short time renewed her abuse of me. I was dazed and struck her with a sort of mallet that I had been using to straighten out the leg of the couch we had been using. I struck her two or three times and thought she was dead. I then placed her body in the trunk and threw the mallet in also. About 12 O'clock that night I removed the trunk from the house and dragged it down to a small pier near the house and threw it overboard. I remained at Moltrasio the next day and left there 125 the following night. I went to Como and from there to Genoa where I took the steamer Princess Irene about four days later. The room where I killed her was a sort of an out-door sleeping apartment.

PORTER CHARLTON.

I have been informed that Mr. C. N. Ispolatoff has been implicated in this matter but I wish to say that this gentleman is absolutely guiltless. I have no defense to make and wish none.

PORTER CHARLTON.

PATRICK HAYES, JR., *Chief of Police.*  
THOMAS GARRICK.  
MICHAEL FALLON.  
LOUIS S. WEINTHAL.

The offense hereabove described is within the crimes contained in the treaty heretofore referred to.

That said Porter Charlton has fled from said Kingdom of Italy and is now held in custody by the Police Department of the City of Hoboken, in the County of Hudson and State of New Jersey.

That a request for the extradition and rendition of the said Porter Charlton by the Government of the United States to the Government of the Kingdom of Italy has been made upon the Secretary of State at Washington, D. C. by Marquis Paolo di Montagliari, Italian Charge de Affaires at Washington, D. C.

Therefore deponent prays that a warrant and commitment for the person of said Porter Charlton may issue out of your Honorable Court, whereby he may be apprehended and confined in the common jail in and for the County of Hudson until thence discharged by due process of law or rendered by the Government of the

126 United States to the Kingdom of Italy.

GUSTAVO DI ROSA.

Sworn and subscribed to before me, a Magistrate in and for the County of Hudson in the State of New Jersey, at the City of Jersey City, on the twenty-fourth day of June, A. D. nineteen hundred and ten.

JOHN A. BLAIR, *Judge*.

127 Department of State to any Justice of the Supreme Court of the United States; any Judge of the Circuit or District Courts of the United States in any District; any Judge of a Court of Record of General Jurisdiction in any State or Territory of the United States, or to any Commissioner specially appointed to execute the provisions of Title LXVI of the Revised Statutes of the United States, for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivering up of certain offenders:

Whereas, pursuant to existing treaty stipulations between the United States of America and Italy for the mutual delivery of criminals, fugitives, from justice in certain cases, Marchese di Montagliari, Charge d'Affaires of Italy has made application in due form, to the proper authorities thereof, for the arrest of Porter Charlton charged with the crime of murder and alleged to be a fugitive from the justice of Italy and who is believed to be within the jurisdiction of the United States.

And Whereas, it appears proper that the said Porter Charlton should be apprehended, and the case examined in the mode provided by the laws of the United States aforesaid.

128 Now, therefore, to the end that the above named officers, or any of them, may cause the necessary proceedings to be had, in pursuance of said laws, in order that the evidence of the criminality of the said Porter Charlton may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the Sec-

retary of State, that a warrant may issue for his surrender, pursuant to said treaty stipulations, I certify the facts above recited.

In Testimony Whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 28 day of June, A. D. 1910, and of the Independence of the United States the 134th—

[SEAL.]

P. C. KNOX,  
*Secretary of State.*

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AMERICAN EMBASSY, ROME, *July 7, 1910.*

I, John G. A. Leishman, Ambassador of the United States of America to the Kingdom of Italy, do hereby certify that the annexed documents numbered respectively 1, 2 and 3 are each and all of them properly and legally authenticated so as to entitle them to be used in all extradition proceedings brought under and by virtue of the treaty between the United States of America and Italy relating to the extradition of alleged fugitives from justice and also in all proceedings to establish the charge of criminality and for similar purposes before the Italian tribunals.

(Signed)

[SEAL.]

JOHN G. A. LEISHMAN,  
*Ambassador Extraordinary and Plenipoten-  
tiary of the United States of America to  
the Kingdom of Italy.*

\* \* \* \* \*

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DEFENDANT'S EXHIBIT A.

Baron Fava to Mr. Blaine.

(*Translation.*)

ROYAL LEGATION OF ITALY,  
WASHINGTON, *April 20, 1890.*  
(Received April 23.)

Mr. Secretary of State:

The note which you did me the honor to address to me on the 21st ultimo contains two points. The first has reference to compliance with the two letters rogatory which I addressed to you on the 19th ultimo, relative to the trial in Italy of Bevivino and Villella, and the second to the extradition of these two Italian subjects, which has been asked for by the United States Government.

As regards the first point, you are pleased to state that, with a view to preventing, if possible, the ends of justice from being wholly defeated in the case of the two criminals in question, you have sent the two aforesaid letters rogatory to the Governors of the States of Pennsylvania and New York for such action as they may deem proper. While thanking you for this information, I beg you to permit me to remark, Mr. Secretary of State, that it is for the very purpose of preventing the ends of justice from being in any way defeated, and in order that justice may be more fully administered



(this point cannot be contested), that Bevivino and Villella are now imprisoned in Italy, so that they may answer, before the courts of their country, for their complicity in the murder committed by Michele Rizzolo, and that the Chamber of Indictments of the Court of Appeals at Catanzaro is now expecting to receive from the  
 259 Courts of the United States the documents which it asked for by the letters rogatory in question. In this connection, I

must even renew my request that you will use your good offices in order to accerlerate so far as possible the transmission of the said documents to this Royal Legation. It is highly important that Bevivino and Villella, who have been in prison for a year, should be speedily tried; and it only depends upon the American judicial authorities to hasten their trial by promptly transmitting these documents.

In the second part of the note to which I am now replying Your Excellency is pleased to remind me that the United States Government in pursuance of the treaty existing between the two countries, applied more than a year ago for the extradition of Bevivino and Villella, and that the Royal Government refused to surrender these two persons on account of their Italian nationality. Your Excellency adds that the treaty contains no exception in favor of Italian subjects or American citizens but that it permits the extradition of all persons in general and that consequently while you transmit the aforesaid letters rogatory to the authorities of the State of Pennsylvania and New York, you must reserve the right, to which you consider the United States Government entitled, to secure the extradition of Bevivino and Villella, in order that they may be tried in the country in which they committed the crime.

It is wholly unnecessary for me to remind Your Excellency that this question has been discussed at length and entirely settled by the Royal Ministry of Foreign Affairs and the United States  
 260 Legation at Rome.

Mr. Stallo must have informed the Honorable Department of State, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, that is to say, from that of the judges of his own country; and that, although an exception is naturally made to this principle, when a citizen who has committed a crime in a foreign country is arrested in that country, it nevertheless resumes its force when the same citizen returns to his country. The new Italian penal code, in its 9th article, as well as the former code in its 5th and 6th articles, are equally explicit on this subject. They solemnly declare that 'the extradition of a citizen is not admissible.'

This system which has been adopted by a majority of the nations of Europe, and the object of which is, not to alter the personal penal status of the citizens, has, during the past fifty years, been most thoroughly examined by writers on international law. All publicists agree in admitting that this principle now forms a part of public law, in virtue of which the governments of continental Europe never grant the extradition of their own subjects.

This principle, moreover, has not only become part of the public

law of Europe, but it has, I am happy to say, been recognized by the United States Government itself in the extradition treaties which it has concluded with Austria-Hungary (Article 2), the Grand Duchy of Baden (article 2), Bavaria (article 3), Belgium (article 5), the Republic of Haiti (article 41), Mexico (article 6), the Netherlands (article 8), Turkey (article 7), Prussia (article 3), and with it the German Empire, in virtue of accession by subsequent treaties,

Spain (article 8), Sweden and Norway (article 4) and Salvador (article 5).

In view of the explicit provisions of the Italian law and of the practical recognition of this principle of universal public law, on the part of the Governments of Europe and that of the United States, it cannot be claimed on the ground of the lack in the treaty between Italy and the United States of an express reservation in favor of natives of the two countries, that Italy has renounced a doctrine which is based, not only on her own laws, but also on her own public law. If the negotiators of the extradition treaty of 1838 had wished to abrogate this universally accepted doctrine which has been especially adopted by the two contracting parties, they would certainly in consideration of its gravity and importance have stated that fact in a formal declaration, adding to the words of the first article of said treaty the following clause: 'without excepting their respective citizens.'

Under these circumstances the government of the King is perfectly justified in declaring, as it has already done that neither the spirit of the Italian law, nor even the text of the treaty invoked by Your Excellency, would permit it to comply with the request which has been made for the extradition of the Italian subjects, Bevivino and Villella.

There is no ground whatever for the inference, from the foregoing, that the guilty parties would, for that reason, escape punishment for the crime committed by them. Any insinuation on this subject would be out of place, since it is a notorious fact that the Italian magistrate at once recognized his own competency; that he immediately proceeded to arrest the accused parties, who are now in prison; and that he commenced a regular judicial action against them without delay. That judicial action would have terminated by this time if the courts of Pennsylvania had promptly complied with the request of the Italian judicial authorities, who requested them early in 1889 to forward the papers in the principal case, which was closed in the United States by the sentence of Michele Rizzolo to capital punishment.

The United States Legation at Rome has been very fully informed of the contents of the present note, and it is only to answer the objections which the United States Government has now thought proper to make to the Course pursued by the Royal Government in this matter that I have had the honor to repeat to Your Excellency the considerations to which the King's government did not fail at the proper time to call Mr. Stallo's attention.

Be pleased to accept, etc.

FAVA.

U. S. Foreign Relations, 1890, P. 555-557.

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## DEFENDANT'S EXHIBIT B.

Mr. Blaine to Baron Fava.

DEPARTMENT OF STATE,  
WASHINGTON, *June 23, 1890.*

SIR: I have had the honor to receive your note of the 20th of April last in relation to the cases of the two Italian subjects Bevivino and Villella, who, having committed murders in the United States of a most aggravated and atrocious character have sought asylum in their own country, which has refused to comply with the demand of this government based upon treaty, for their extradition. The immediate occasion of your note was the reply made by me to your request for the execution in this country of letters rogatory, issued by a court in Italy, before which the two fugitives have been arraigned for trial, under Italian law, for the crimes committed in the United States. In that reply I stated that, with a view to preventing if possible the total defeat of the ends of justice in the cases in question, I would forward the letter to the Governors of the States of Pennsylvania and New York for such action as they might find it proper to take, the letters being respectively addressed to the authorities in those States. At the same time I took occasion to reserve what I regarded as the clear right of the Government of the United States under the treaty with Italy to require the delivery of the fugitives for trial in this country.

In answer to this you remind me that this question has been discussed at length and entirely settled by the Royal Ministry  
264 of Foreign Affairs and the United States Legation at Rome; that Mr. Stallo lately the Minister of the United States to Italy, must have informed this Department that, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, the judges of his own country; and that, although an exception is made to this principle when a citizen who has committed a crime in a foreign country is there arrested, it nevertheless resumes its force when he returns to his own country. You also state that the new Italian Penal Code expressly forbids the extradition of Italian subjects, and declare that this principle now forms a part of public law, which the United States has recognized in many of its treaties. For these reasons you argue that, 'if the negotiators of the extradition treaty of 1868 had wished to abrogate this universally accepted doctrine, which has been specially adopted by the two contracting parties,' they would certainly 'have stated the fact in a formal declaration, adding to the words of the first article of the said treaty the following clause: 'without excepting their respective citizens. Under these circumstances, you contend that neither the spirit of Italian law, nor even the text of the treaty, would permit the Italian government to comply with the request for the surrender of Bevivino and Villella.

From this conclusion I should not dissent if I could accept the arguments upon which it is based. I find myself, however, wholly

unable to accept those argument. In the first place, I may be permitted to observe that we are not discussing a question of Italian law, but an international contract between the United States and

Italy. In this relation it cannot be regarded as conclusive—  
265 if, indeed, it is at all pertinent—to quote the Italian municipal law to say nothing of the provisions of the new penal code twenty years after the conclusion of the treaty. If the decision of the question be put upon the municipal law of the contracting parties, this government is entitled to appeal to its own by which no exception is made in favor of its citizens. Viewing the matter merely as a subject of statutory regulation, the surrender by the United States of its citizens is entitled to as much weight as the refusal of Italy to pursue the same course with respect to Italian subjects.

You are correct in your supposition that Mr. Stallo informed the Department of the provisions of Italian law on the subject, but the Department is surprised to learn that the Government of Italy entertains the impression that the question was settled by the Royal Ministry of Foreign Affairs and the United States Legation at Rome. In various interviewz with the Royal Ministry of Foreign Affairs reported by him to the Department, as well as in formal communications addressed to that ministry, Mr. Stallo protested against the position of the Italian Government; and the Department is not informed of anything said or written by him that savored of acquiescence. Mr. Stallo's personal views were strongly adverse to the position ultimately taken by the Royal Ministry, and in those views he was supported by the instructions of the Department. The Department is therefore by no means inclined to regard the question as settled. It is thought that it would be a dangerous precedent to admit that a nation may determine its conventional duties by its own statutes. And for this reason, among others,  
the Government of the United States, being clearly of  
266 opinion that it is entitled to the extradition of Bevivino and Villella under the treaty of 1868, is unable to relinquish its claim in response to any of the arguments which have been brought against it.

In order to understand the present controversy it is necessary to revert to its origin. It did not arise in the cases of Villella and Bevivino, but in that of Salvatore Paladini, whose extradition Mr. Stallo, on May 17, 1888, demanded of the Italian Government on a charge of passing counterfeit money of the United States, for which Paladini was under indictment in the District Court of the United States for the District of New Jersey. It being important to secure the arrest of the fugitive without delay, Mr. Stallo delivered the requisition to Mr. Crispi in person and called his attention to the urgency of the matter. Mr. Crispi promised to refer it immediately to the Ministry of Grace and Justice and asked no question as to the fugitive's citizenship. Mr. Stallo heard nothing more of the case until the 2nd of June, when he received a letter from the Foreign Office stating that his application had been communicated to the Ministry of Grace and Justice without the least delay, but that

it was important to know of what country Paladini was a native and what were his paternity and his citizenship. This inquiry was made for the first time nearly two weeks after the date of the application. On the same day Mr. Stallo replied that Paladini was a native of Messina, in Sicily, and had never been naturalized as a citizen of the United States, having been in that country only a few months before committing the crime imputed him. To this

note no reply was made; and on June 25, 1888, Mr. Stallo  
267 addressed another note to Mr. Crispi, calling attention to the fact that he had not been advised whether the warrant of arrest asked for on the 17th of May had been issued or whether any steps toward Paladini's arrest had been taken. On July 2 Mr. Damiani, the under-secretary of State, replied that the Minister of Grace and Justice had communicated the facts to the Ministry of the Interior, which had taken the steps necessary to the fugitive's apprehension. On July 7 Mr. Damiani wrote again to the effect that the Royal Prefecture in Messina, to which place Paladini had returned was unable to find him and believed that he had gone back to the United States. Of this note Mr. Stallo acknowledged the receipt on the 14th of July, and at the same time requested the return of the papers which he had submitted to the Foreign Office 2 months previously in support of his demand for Paladini's surrender. In order, however, that there might be no room for misconstruction of his action, he adverted to the question of citizenship and observed that in his note of May 17 and the documents accompanying it there was no reference to Paladini's nationality, for the reason that the treaty of 1868 made no distinction between citizens of the contracting parties and other persons. On July 26 Mr. Stallo had an interview with Mr. Crispi, in which the latter took the ground that the treaty did not require the surrender of citizens, and also asserted his impression that there was an express reservation on the subject. Mr. Stallo replied that he was quite fresh from his reading of the treaty and that Mr. Crispi's impression was erroneous. On the following day Mr. Stallo addressed to Mr. Crispi an elaborate argument, showing that the treaty contained no exception as to  
268 citizens, and saying, among other things, that since the middle of the present century no state had assumed the right to refuse the extradition of its subjects charged with the commission of crime abroad, unless the treaty under which the surrender was demanded contained a clause justifying such refusal.

On July 27 the Minister of Foreign Affairs replied, saying, among other things, that the ministry of grace and justice, which had been consulted, was of opinion that in the present state of the case the question of citizenship need not further be discussed, for the reason that, according to the rules which governed extradition in Italy, it was necessary to hear in each case, first, the opinion of the crimes section of the court of appeals in the district in which the arrest was asked for (articles 853 and 854 of the code of criminal procedure); second that of the council of state on the question whether the demand for extradition was conformable to the stipulations of the convention (article 8, No. 2, of the law of March 20,

1865). Paladini not being under arrest, a decision of those tribunals could not be asked. After the receipt of this note Mr. Stallo learned that Paladini had been arrested at Messina. He at once saw Mr. Crispi, who said, that in his judgment, it was not necessary at the moment to determine whether an Italian subject could be surrendered, inasmuch as that question would be decided by the court at Messina, before which Paladini would be brought. He added that his interpretation of the treaty of 1868 had been based upon the circumstance that the law of Italy prevented the extradition of Italian subjects for crimes perpetrated in foreign jurisdictions, the crimes committed by them being justiciable by the Italian courts. Mr. Stallo replied that he supposed that in Italy, as elsewhere, treaty obligations were a part of the law of the land, so that in the end they were brought back to the question of Italy's obligation under the treaty. Subsequently, an extended correspondence took place, Mr. Stallo maintaining the duty of surrender and the foreign office denying it. It is proper to notice that in a note of August 28, transmitted to the foreign office August 30, 1888, Mr. Stallo adverted to the fact that the demand for Paladini's surrender was made on May 17, and that, notwithstanding the evident Italian character of his name, for more than two weeks nothing was said about his nationality. Mr. Stallo also observed that in his note of June 2 he distinctly informed the Minister of Foreign Affairs that Paladini was an Italian subject who had never been naturalized in the United States; but notwithstanding this distinct notice, none of the communications addressed to him by the Italian foreign office thereafter contained a hint that Paladini could not be extradited because he was an Italian subject, and that it was not until the interview of July 26 that this claim was first advanced. From this fact, coupled with the circumstance that all this time and for more than two months the American agent had waited in Italy to receive Paladini upon his arrest and extradition, as the Italian authorities well knew, the inference would seem to be not only legitimate, but irresistible, that for two months and several days at least the view taken by the Italian Government of its duty under the treaty of 1868 was the same as that held by the United States.

On August 30, 1888, Mr. Damiani returned the President's warrant to Mr. Casale, the agent of the United States, to the Legation without any comment. On the following day Mr. Dougherty, Secretary of the Legation, acknowledged its receipts and inquired whether, by the return of the warrant, he was to understand that the Government of His Majesty the King of Italy refused to extradite Paladini.

On October 25, Mr. Crispi, more than five months after the original demand, announced that, according to the Italian procedure, the minister of grace and justice had submitted the demand to the successive examination of the criminal section of the Court of Appeals of Messina, of the council of State, and of the council of ministers, and that they were unanimously of opinion that Paladini should not be extradited for the reason that he was an Italian sub-



ject. This opinion, he said, was based upon certain principles, which he stated. It is unnecessary to recount them, since they are the same, in almost the same language, as those set forth in your note.

In January, 1889, the Department received from Governor Beaver, of Pennsylvania, information that two Italians named Vincenzo Vilella and Guiseppe Bevivino, charged with the commission of atrocious murders in Luzerne County, Pa., had taken refuge in Italy. The Department at once telegraphed information of the facts to the Legation at Rome. Mr. Stallo saw the Minister of Foreign Affairs, and, laying the facts before him, was assured that measures would at once be taken for the arrest of the accused and for their eventual trial in Italy as soon as he could give their names, which he was at the time unable to do, owing to a confusion in the telegrams.

On January 30, 1889, Governor Beaver made a formal request that the extradition of the fugitives be demanded. He had  
271 been informed of the attitude of the Italian Government in the case of Paladini, but, because of the importance of inflicting punishment upon the criminals in Pennsylvania, and influenced by an opinion which, he had been informed had been expressed by the Italian Consul at Philadelphia to the effect that the fugitives would be given up, he asked the Department to endeavor to obtain their surrender. A President's warrant was accordingly issued to John R. Saville and Frank P. Dimaio, the persons designated by Governor Beaver to receive the fugitives, and Mr. Stallo was so informed. These agents, Mr. Stallo was also informed, would take with them authentic proof of the guilt of the fugitives, and upon arriving in Italy would proceed at once to Rome to consult with him. Meanwhile he was to ascertain whether the extradition of the fugitives could be obtained, and to apply to the Italian Government for that purpose.

On February 20, Mr. Stallo acknowledged the receipt of the papers, which he transmitted to the foreign office with an application for the fugitives' surrender, coupled with an expression of the earnest desire of the United States that the determination in the Paladini case should be reconsidered. Mr. Stallo also called attention to the fact that the principle witness against the two fugitives was their accomplice, Michele Rizzolo, who was under arrest at Wilkes Barre, in Pennsylvania, and had made a full confession and that it was impracticable to bring this witness, either before or after his trial, to Italy in order to testify before an Italian court.

On the 7th of March, Mr. Stallo inclosed to the Depart-  
272 ment a note from Mr. Crispi, bearing date of the preceding day, in which the surrender of the fugitives was refused. The reasons given were the same as those stated in the case of Paladini.

It was in view of the total divergence of opinion between this government and that of His Majesty, developed in the preceding correspondence, that I deemed it necessary to make the reservation contained in my note of the 21st of March last. I shall now endeavor



to show that that reservation was not only justified, but also required, by the circumstances.

I do not understand the Italian Government to deny that the provisions of the treaty of 1868, if not obstructed by any municipal statute or qualified by any principle of international law, would oblige the contracting parties to deliver up their citizens. Indeed, I assume this to be admitted. The treaty says that the two governments mutually agree to deliver up "persons, who, having been convicted of or charged with the crimes specified in the following article committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other." As the term "persons" comprehends citizens, and as the treaty contains no qualification of that term, it is unnecessary to argue that the treaty standing alone would require the extradition by the contracting parties of their citizens or subjects.

I shall also assume it to be admitted by the Italian Government that the parties to a treaty are not permitted to abridge their duty under it by a municipal statute. It is true that the authorities of a country may, by reason of such a statute, find themselves deprived of the power to execute a treaty. But if, in obeying the  
 273 statute, they violate or refuse to fulfill the treaty, the other party may justly complain that its rights are disregarded and may treat the convention as at an end. Hence in appealing to its statutes to justify its action in the present case, I understand the position of the Italian Government to be that those statutes are merely declaratory of the law by which nations are bound to be governed in their dealings one with another.

We are brought, therefore, to the consideration of the question whether the refusal of the Italian Government to deliver up Paladini, Villella, and Bevivino, under the treaty of 1868, is justified by the principles of international law. The answer to be given to this question must be decisive of the matter.

It is stated—and the statement has the sanction of the eminent Italian publicist Fiore—that the refusal to surrender citizens had its origin in the practice of extradition by France and the Low Countries in the eighteenth Century. Formerly such an exception was not recognized. Even the Romans, who were not wanting in a disposition to assert their imperial prerogatives, did not refuse to deliver up their citizens, their *feciales* being invested, in respect to states in alliance with Rome, with authority to investigate complaints against Roman citizens and to surrender them to justice if the complaints were found to be well grounded. The exception of their citizens by France and the Low Countries originated in the following manner:

The two countries practiced extradition, not under a convention, but under independent declarations of a general character.  
 274 By the Brabantine Bull, issued by the German Emperor in the fourteenth century, subjects of the Duke of Brabant enjoyed the privilege of not being withdrawn from his jurisdiction. A similar privilege was gradually extended by law and usage to other subjects of the House of Austria, while the Low Countries were still under its dominion. In consequence of the establishment of this

rule, the Low Countries refused to deliver up their subjects, and France, as an act of retaliation, refused to surrender Frenchmen. Thus, not in recognition of any principle, but merely with a view to observe a strict reciprocity, was the precedent first established.

That the example thus set has generally been followed by European States is not to be questioned; for, with the single exception of England, it is believed that they have adopted the rule of refusing to deliver up their citizens. But in order to determine the force and effect of this rule from the point of view of international law, it is necessary to inquire how it has been secured and enforced. Where no treaty exists the subject is simple. It is generally agreed that, in the absence of a convention, extradition is a matter of comity, and not of positive obligation. In such case each nation is free to regulate its conduct according to its own discretion. If it declines to surrender its citizens, its action, though detrimental to the interests of justice, does not afford ground for complaint or pressure, since it is acting within its right. But, where the subject is regulated by treaty, the case is different. What before was a matter of comity and discretion, becomes a matter of duty, and the measure of that duty is the treaty.

275 It is not strange, therefore, that, in order to avoid the obligation to extradite their citizens, the states of Europe have industriously inserted in their treaties an express stipulation to exempt themselves from that obligation. With respect to those who are to be surrendered, they usually employ, as is done in the treaty between the United States and Italy, the general term "persons." Having used this term they then proceed to insert a clause to except their citizens from the general obligation; and it is by means of this clause, and not by reason of an implication created by international law, that the duty of surrender is avoided.

More cogent proof of this fact could not be found than is afforded by the extradition treaties of the United States with European nations, to which you refer for the purpose of showing that this government has recognized the exemption of citizens by international law. Among those treaties is that with Prussia and other German states, concluded June 16 1852, which is the first in which the United States admitted an exception of citizens. It is a part of the public history of extradition that for years the Government of the United States refused to negotiate treaties for the surrender of fugitives from justice with several of the states of Europe, because, owing to the limitations of their domestic laws, they insisted upon the insertion of a clause to exempt their citizens. It was for this reason alone that this government in order to avoid the misfortune of a total lack of extradition, finally admitted the exception. Accordingly, we find in the preamble to the treaty with Prussia and other German states the following recital:

"Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and  
276 jurisdiction of the parties respectively that persons committing certain heinous crimes, being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, and

also to enumerate such crimes explicitly; and whereas the laws and constitution of Prussia, and of the other German states, parties to this convention forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, etc.

This recital, it is to be observed, was not a declaration by the United States alone, but by both parties, of the reason for the exclusion of citizens. The same declaration is found in the treaty with Bavaria of 1853, with Austria-Hungary of 1856, with Baden of 1857, and with various German states by virtue of their accession to the treaty, with Prussia, which was, in 1868, finally extended to the whole of the North German Confederation.

In the record of the negotiation of the treaty with Italy no reference is found to the subject of citizens. What may have been said in the oral discussions cannot now be discovered: It is, however, a matter of record in this department that in the same year, 1868, Mr. Seward, who, as Secretary of State, signed the treaty on the part of the United States refused to conclude a convention with Belgium because she insisted upon the exception of her citizens. In this rela-

277 tion I may advert to another fact which possesses great significance. The treaty of extradition concluded between the United States and Italy in 1868 was one of two treaties concluded between those countries in that year, the other relating to the rights and privileges of consuls. These treaties were designed to take the place of the treaties formerly made between the United States and the independent states of Sardinia and the Two Sicilies. In the treaty with the latter government of 1855 there were stipulations relating to extradition, and among them was the following provision:

The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals.

(Article XXIV.)

In view of the existence of this clause in the treaty with the two Sicilies, it can scarcely be supposed that the parties to the substitutionary arrangement of 1868 negotiated that instrument in oblivion of the question as to citizens. And when we consider the omission of the clause, especially in conjunction with Mr. Seward's refusal to negotiate with Belgium, the inference seems to be morally irresistible that the obligation to deliver up their citizens, under the treaty of 1868, was fully understood by the contracting parties at the time of its conclusion.

From what has been stated I am forced to conclude, not only that international law does not except citizens from surrender, but also that it has been well understood, especially in dealing with the United States, that the term "persons" includes citizens and requires their extradition, unless they are expressly exempted.

278 Nor am I able to find sufficient ground for the refusal to surrender citizens in the general principles on which extradition is conducted. It does not satisfy the ends of justice to say that, although a nation does not extradite its citizens, it undertakes to try and punish them. This argument may be admitted to have great force where, by reason of the absence of any conventional assurance of reciprocity, a nation declines a demand addressed to its discretion. But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offense was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment, and the moral effect of retribution most needed. There also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition. In France I need only to refer to such well-known writers on extradition as Billot and Bernard. In Italy I may refer again to the eminent publicist Fiore, who says that, in spite of all that has been said on the subject, his opinion is that,

279 while in former times the absolute prohibition against the surrender of citizens had some reason for its existence, it is insisted upon to-day rather as one of numerous conventional aphorisms, accepted without searching discussion for fear of showing too little regard for national dignity (*Traite de droit penal int.*, section 362). I will not extend the length of this note by citing other books, but, as showing the general view of eminent publicists, will refer to two resolutions of the Institute of International Law, adopted at the session at Oxford in 1881-'82. Those resolutions are as follows:

VI. Between countries whose criminal legislation rests on like bases, and which should have mutual confidence in their judicial institutions, the extradition of citizens would be a means to assure the good administration of penal justice, since it ought to be regarded as desirable that the jurisdiction of the *forum delicti commissi* should, so far as possible, be called upon to judge.

VII. Admitting it to be the practice to withdraw citizens from extradition, account ought not to be taken of a nationality acquired only after the perpetration of the act for which extradition is demanded. (*Annuaire*, v, 1881-'82, pp. 127, 128.)

At the session at which these resolutions were adopted seventeen members and eight associates of the institute were present, including some of the most eminent publicists in Europe, and representing

Italy, Germany, Austria, Belgium, Spain, France, Great Britain, Greece, Russia and Sweden.

280 In view of what has been shown I am unable to discover any ground of reconciliation of the totally opposite views entertained by the United States and Italy in regard to the force and effect of the treaty of 1868, unless the government of Italy will reconsider its position. The present situation, therefore, seems to me to require either the denunciation of that treaty or the conclusion of new stipulations upon which the contracting parties will find themselves in agreement. If, as a part of those stipulations citizens should be excepted, it would be essential to reach an understanding as to the effect of naturalization. These matters it is not my purpose to discuss on the present occasion, but I deem it my duty to suggest them for consideration.

Accept, etc.,

JAMES G. BLAINE."

Foreign Relations, 1890, pp. 559-556.

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DEFENDANT'S EXHIBIT C.

"Baron Fava to Mr. Blaine.

(Translation.)

ROYAL LEGATION OF ITALY,  
WASHINGTON, July 3, 1890.  
(Received July 7.)

MR. SECRETARY OF STATE: I hasten to acknowledge the receipt of the note which you did me the honor to address to me under date of the 23rd ultimo, relative to the extradition of Villella and Bevivino. I at once communicated the contents thereof to His Majesty's Government.

Your Excellency will permit me at the same time to rectify an assertion contained in your note, according to which the consul of the King at Philadelphia expressed an opinion in regard to this case which was reported to the Governor of Pennsylvania, and which furnished to him an additional argument for endeavoring to induce the Federal Government to secure the extradition of the two persons in question from the Royal Government.

From the very outset I was scarcely able to believe that the statement contained in Your Excellency's note could be correct, since it seemed hardly possible that a consul of the King could have expressed an opinion concerning a matter that was outside of his competence, as it formed the subject of negotiations between the two Governments. Nevertheless, in view of the importance of the source mentioned, I deemed it my duty to request the consul of  
282 Italy at Philadelphia to furnish an explanation.

This explanation is of such a nature that Your Excellency will, I think, have no difficulty in reaching the same conclusion that I have reached, viz, that Governor Beaver has been misinformed.

Mr. Serra, who was in charge of the consulate at the time, had no knowledge of the case save what he had gleaned from a conversation with a detective who called at the consulate one day, and, after talking of this matter with other persons who were present, asked Mr. Serra his opinion concerning the surrender of Villella and Bevivino. The vice-consul told him in reply that he had no opinion to express, inasmuch as the question was pending between the two Governments, but that he thought that the abolition of the death penalty in Italy would constitute an almost insurmountable obstacle to the surrender of these two persons.

Such is the simple fact, which I have desired to make known to Your Excellency with the sole view of establishing the truth, and without wishing to cause the incident to appear more important than it really is.

Be pleased to accept, etc.,

FAVA."

(U. S. For. Rel. 1890, p. 567.)

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DEFENDANT'S EXHIBIT D.

"Extradition of Delzoppo and Rinaldi.

Mr. Uhl to Mr. Potter.

(No. 101.)

DEPARTMENT OF STATE,  
WASHINGTON, *January 26, 1894.*

SIR: You are instructed to request of the Italian Government, in pursuance of existing treaty stipulations, the extradition of Michele Delzoppo and Antonio Rinaldi, under indictment on the charge of murder committed within the State of New York, and who are now in Italy.

The President's warrant to receive the fugitives has been issued to Frank J. McNeil, who is authorized to convey them back to the United States for trial. Mr. McNeil is also furnished with duly authenticated copy of the papers in the case.

In this connection I acknowledge the receipt of your telegram of this date, reading as follows: 'Order issued; arrest Delzoppo and Rinaldi.'

I am, etc.,

EDWIN F. UHL,  
*Acting Secretary."*

(U. S. For. Relations 1894, p. 369.)

284

"Mr. MacVeagh to Mr. Gresham.

(No. 15.)

EMBASSY OF THE UNITED STATES,  
ROME, *April 10, 1894.*  
(Received April 23.)

SIR: On the 3d instant I sent you the following cablegram:

Delzoppo and Rinaldi found pursuant your cable January 26 and watched, but arrest impossible without warrant. Agent has never appeared with warrant. Italian Government now asks very prompt action as fugitives intend leaving country.



To this I received next day your reply, as follows:

Will Italian Government surrender Delzoppo and Rinaldi upon proof of guilt?

To my inquiry, dated the 4th instant, I this morning received a note from the minister of foreign affairs stating that the Government of the King could never consent to the extradition of its own subjects, but that the authorities were ready on presentation of the necessary documents to arrest and place on trial here Michele Delzoppo and Antonio Rinaldi.

On receipt of this note I to-day cabled you as follows:

Italian Government refuses surrender its subjects, but offers on arrival proof of guilt to arrest and try Delzoppo and Rinaldi here.

I am, etc.,

WAYNE MACVEAGH."

(U. S. For. Relations, 1894, p. 370.)

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"(Inclosure 1 in No. 15.)

Mr. MacVeagh to Baron Blanc.

EMBASSY OF THE UNITED STATES,

ROME, April 4, 1894.

YOUR EXCELLENCY: On receipt of the note from the ministry for foreign affairs, dated the 2d instant, informing this embassy that Michele Delzoppo and Antonio Rinaldi, two criminals who are wanted in the United States for trial on a charge of murder, were at present under the surveillance of the police the one at Alexandria and the other at Matrice, I telegraphed my Government as follows:

Delzoppo and Rinaldi found pursuant your cable January 26 and watched, but arrest impossible without warrant. Agent has never appeared with warrant. Italian Government now asks very prompt action as fugitives intend leaving country.

To the above telegram I have received the following reply:

Will Italian Government surrender Delzoppo and Rinaldi upon proof of guilt?

I would be obliged if Your Excellency would enable me to make an immediate reply to this telegram.

I avail, etc.,

WAYNE MACVEAGH."

(U. S. For. Relations 1894, p. 370.)

286

"(Inclosure 2 in No. 15—translation.)

Baron Blanc to Mr. MacVeagh.

MINISTRY FOR FOREIGN AFFAIRS,

ROME, April 9, 1894.

MR. AMBASSADOR: In reply to the esteemed note of your excellency of the 4th instant I have the honor to inform you that the Government of the King could never consent to the delivery in extradition of two of its subjects. The authorities of the Kingdom of Italy are ready, as soon as your excellency furnishes me with the



necessary documents, to arrest Michele Delzoppo and Antonio Rinaldi and put them on trial.

Accept, Mr. Ambassador, etc.,

BLANC."

(U. S. For. Relations 1894, pp. 370, 371.)

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"Mr. Uhl to Mr. MacVeagh.

(No. 18.)

DEPARTMENT OF STATE,  
WASHINGTON, April 24, 1894.

SIR: I have received your dispatch No. 15, of the 10th instant, relative to the extradition of the fugitives Michele Delzoppo and Antonio Rinaldi, with which you transmit a copy of the note of the minister for foreign affairs stating that the Italian Government 'could never consent to the delivery in extradition of its subjects.'

Upon receipt of your telegram of the 10th instant, conveying the same information, the Department communicated it to the governor of New York. No further action will be taken in the case without the request of the authorities of that State. It is deemed proper, however, that you should state to the Italian Minister for foreign affairs that while this Government will not at this time insist upon its rights under the treaty between the two Governments, it, nevertheless, does not waive such rights nor acquiesce in the view taken by the Government of Italy.

I am, etc.,

EDWIN F. UHL,  
*Acting Secretary."*

(U. S. For. Relations, 1894, p. 371.)

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DEFENDANT'S EXHIBIT "G."

Title Page.

Codice Penale per il Regno D'Italia.

Torino.

Fratelli Bocca,

Milano—Roma—Firenze.

1902.

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Title Page.

Penal Code for the Kingdom of Italy.

Turin.

Bocca Brothers,

Milan—Rome—Florence.

1902.

290

*Royal Decree.*

Umberto I, per grazia di Dio e per volonta della Nazione Re D'Italia.

Vista la legge 22 novembre 1888, n. 5801 (serir 3a), con la quale il Governo del Re fu autorizzato a pubblicare il codice penale per

il Regno d'Italia, allegate alle legge stezza, introducendo nel testo di esso quelle modificazioni, che, tenuto conto dei voti del Parlamento, revvisasse necessarie per emendarne le disposizioni e coordinarle tra lore e con quelle degli altri codici e leggi;

Inteso il Consiglio dei Ministri;

Sulla proposta del Nostro Guardasigilli, Ministro Segretario de Stato per gli affari de Grazia e Giustizia e dei Culti;

Abbiamo decretato e decretiamo:

291

*Royal Decree.*

Humbert I, by the Grace of God and the Will of the Nation King of Italy.

Concerning the law of November 22, 1888, n. 5801 (Series 3a), under the provisions of which the government of the King was authorized to publish the Penal Code for the Kingdom of Italy, connected with and a part of said law, to embody in its text such modifications thereof as, in view of the votes of the Parliament, have become necessary for its amendment (correction-emendarne) and cooridantion between the law itself and the amendments thereof, and with the provisions of the other codes and laws:—

After consultation with the Council of Ministers; upon the proposals of the Custodian of our Seal, Secretary Minister of State for the Affaires of Grace, Justice and Religion (Culti):—

We have decreed and do hereby decree:—

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*Royal Decree—2.*

ART. 1. Il testo definitivo del Codice penale portante la data questo giorno e approvato ed avra esecuzione a cominciare dal lo gennaio 1890.

ART. 2. Un esemplare del suddetto testo definitivo del Codice penale, stampato nella Regia tipo gradia, firmato da Noi e contrassegnato dal Nostro Ministro di Grazia e Giustizia e dei Culti, servira di originale e sara depositato e custodito negli archici generali del Regno.

ART. 3. La pubblicazione del predetto Codice si eseguirà col trasmetterne un esemplare stampato a ciascuno dei Comuni del Regno per essere depositato nella sala del Consiglio comunale etunto ivi esposto durante un mese successive per sei ore in ciascun giorno, affinche ognuno possa prenderne cognizione.

Ordinamo che il presente decreto, munito del sigillo dello Stato, sia inserto nella raccolta ufficiale delle leggi e dei decreti del

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*Royal Decree—2.*

ART. I. The definite text of the Penal Code bearing this date is approved and shall be in force and effect on and after the first day of January, 1890.

ART. II. A copy of said definite text of the Penal Code, printed in the Royal Printing Office, subscribed by Us, and countersigned by our Minister of Grace, Justice and Religion, shall serve as the original and shall be deposited in, and in custody of the general archives of the Kingdom.

ART. III. The publication of said Code shall be effected by transmitting a printed copy thereof to each Community (Municipality-Comuni) of the Kingdom for deposit in the Council Hall of the Community (Municipality) and to be held there exposed during one month thereafter for six hours on each day so that every person may take cognizance thereof.

We order that the present Decree, with the seal of State affixed, shall be inscribed in the official collection (raccolta) of the laws and decrees of the

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*Royal Decree—3.*

Regno d'Italia, mandando e chiunque spetti di osservarlo e di farlo osservare.

Dato a Roma, addì 30 giugno 1889.

UMBERTO.

G. ZANARDELLI.

295

*Royal Decree—3.*

Kingdom of Italy, commanding every person concerned to obey (osservando) this decree and to see that it is obeyed (Osservare).

Given at Rome, on the 30th day of June, 1889.

HUMBERT.

G. ZANARDELLI.

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*First Book.**Libro Primo.**Dei Reati e Delle Pene in Generale.**Titolo I.**Dell' Applicazione della Legge Penale.*

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9. Non e ammessa l'estradizione del cittadino.

L'estradizione dello straniero non e ammessa per i delitti politici, ne per i rati che a questi siano connessi.

L'estradizione dello straniero non puo essere offerta ne consentita se non dal governo del Re, e previa deliberazione conforme dell'autorita giudiziaria del luogo in cui lo straniero si trovi.

Nondimeno, su domanda od offerta di estradizione puo essere ordinate l'arresto provvisorio delle straniero.

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*First Book.*

## First Book.

## Concerning Crimes and Penalties in General.

## Title I.

## Of the Application of the Penal Law.

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9. The extradition of a citizen is not permitted (conceded-am-messa).

The extradition of an alien is not permitted (Conceded-am-messa) for political offenses, nor for crimes connected with political offenses.

The extradition of an alien can neither be offered nor granted except by the government of the King, and after previous deliberation in conformity with the judicial authority of the place in which the alien is found.

However, upon demand or offer of extradition, the provisional arrest of an alien may be ordered.

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298 In the Court of Oyer & Terminer and Quarter Sessions of the Peace in and for the County of Hudson, and State of New Jersey.

STATE

v.

PORTER CHARLTON.

*In the Matter of the Extradition of Porter Charlton.*

UNITED STATES OF AMERICA,

*District of Columbia, ss:*

Comes now Oscar George Theodore Sonneck, who signs his name Oscar G. T. Sonneck, and, being first duly sworn, says:

I am of full age, and employed in the Library of the Congress of the United States, in the City of Washington, District of Columbia, United States of America, where I reside; I am familiar with the Italian language, both by study, and by residence in Italy; the attached translation into English, of the Italian text opposite to each page thereof, has been made by me, and after transcription into type-writing has been compared, and approved by me as a true and correct translation of such portions of the Italian Penal Code, submitted to me, as are germane to the subject of Extradition thereunder, and of all portions of said Code germane to said subject.

(Sgd.)

OSCAR G. T. SONNECK.

299 Subscribed in my presence and sworn to before me this 3d day of October, 1910, at the City of Washington, in the District of Columbia, as witness my hand and notarial seal as of said date.

(Sgd.)

MARTIN A. ROBERTS,

*Notary Public in and for the District of Columbia.*

My commission expires November 12, 1912.

Being the copy of said Code on file in the Library of Congress.

(Sgd.)

OSCAR G. T. SONNECK.

(Endorsed:) In Re Application of Porter Charlton for Writ of Habeas Corpus &c. Filed December 19, 1910. H. D. Oliphant, Clerk.

300 Before Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Tuesday, June 28th, 1910.

STATE

VS.

PORTER CHARLTON.

Said Prisoner Being Held on Complaint that He is a Fugitive from Justice in Italy.

Mr. Pierre P. Garven, Prosecutor of the Pleas of Hudson County, appeared for the State, and for the Italian Government.

Mr. Edwin F. Smith appeared for the defendant.

The prisoner was brought into court.

Mr. GARVEN: May it please the Court, the State is prepared to produce evidence before the Court on the extradition matter of Porter Charlton.

Mr. SMITH: We desire to have a postponement until the eighth of July, and we agree not to apply for any habeas corpus proceedings during that time.

Mr. GARVIN: We have no objection to the adjournment on the stipulation that no proceedings will be instituted in the meantime to take this man from the custody of the court here.

Furthermore, we think the State will produce evidence which will show a prima facie case.

Mr. SMITH: We will make that stipulation, and your Honor may make it a matter of record.

301 The COURT: The Court, on the application made by the counsel, and with the consent of the State, will grant an adjournment until the eighth day of July, with the distinct understanding that during that period of adjournment no application or proceeding shall be instituted for the release of the prisoner from the custody of this Court.

The prisoner may be remanded meantime.

The prisoner was then removed from the court room.

- 302 Before Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Friday, July 8th, 1910.

STATE  
vs.  
PORTER CHARLTON.

*In the Matter of the Extradition of the Prisoner, Held on a Complaint of Murder Committed in Italy.*

Mr. Pierre P. Garven, Prosecutor of the Pleas of Hudson County, appeared for the State, and for the Italian Government.

Mr. Edwin F. Smith appeared for the defendant.

The defendant is present in Court.

Mr. Gustafo di Rosa, of the Italian Consulate, Presented the certificate or mandate from U. S. Secretary of State (See page 15) to Judge Blair.

Mr. GARVEN: Mr. Smith asks for an adjournment of the hearing on the matter. We agree to the adjournment on the same stipulation made when the previous adjournment was granted, that there shall be no proceedings meantime. The matter may be adjourned to any day that is agreeable under that understanding.

Mr. SMITH: Yes, we will continue that same stipulation.

The COURT: Adjourned to August 11th, 1910.

The prisoner may be taken back to jail meantime.

The prisoner was then taken out of the court.

- 303 Before the Hon. John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County, State of New Jersey, Thursday, August 11th, 1910.

STATE  
vs.  
PORTER CHARLTON.

Mr. VICKERS: I introduce Mr. De Rossa, Italian Consul at New York, who wishes to present the dossier so as to have it appear on the record that the Italian Government at this day of adjournment is ready.

The COURT: I suppose that nothing can be done now further than to formally receive this, and hold the matter until the expiration of the period of adjournment.

Mr. VICKERS: I understand it to be the rule that a translation is required, and Mr. De Rossa tells me none has been had.

The COURT: I suppose then that perhaps it ought to be translated.

Mr. De ROSSA: I would prefer to do it. Isn't it sufficient to certify to the correctness of the signature? It will then be adjourned to the 21st of September? In the meantime it is directed that there shall be evidence?

The COURT: Yes.

Mr. VICKERS: Will your Honor consider that the papers are filed, and permit the Italian Vice-Consul also to take them from the files for translation?

The COURT: Yes.

304 Before the Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County.

STATE OF NEW JERSEY, WEDNESDAY, September 21, 1910.

STATE

VS.

PORTER CHARLTON.

*Hearing on the Application for Extradition of the Prisoner Porter Charlton.*

This matter came on to be heard before the Honorable John A. Blair, Judge of the Court of Oyer and Terminer of Hudson County in the State of New Jersey, sitting as a committing magistrate, in the Court House in Jersey City, on the twenty-first day of September, Nineteen hundred and Ten.

The prisoner was brought into court.

Mr. Pierre P. Garven, the Prosecutor of the Pleas of Hudson County, and Mr. George T. Vickers, the First Assistant prosecutor of the Pleas of Hudson County, appeared for the State and for the Italian Government.

Mr. William D. Edwards, Mr. Edwin F. Smith and Mr. Floyd Clarke, appeared for the prisoner.

Mr. GARVEN: If the Court please, I move the matter of the application for the extradition of Porter Charlton. I understand from his counsel that there is no objection to this copy of the complaint being used instead of the original and it is hardly necessary

305 for me to read it to the Court. Your Honor is familiar with the complaint, and I will simply offer it in evidence.

Mr. EDWARDS: That is all right; we do not object to the copy being used instead of the original.

(Complaint received in evidence and marked S/1—J. M.)

Mr. GARVEN: I ask the counsel to admit that this defendant is Porter Charlton for whom the Italian Government has requisitioned the United States Government, and that he was arrested and confined in the County Jail here on the Complaint which has been introduced in evidence here, and has been confined since that time here in the County Jail.

Mr. EDWARDS: If the Court please, I have associated with me Mr. R. Floyd Clarke, a member of the New York Bar, whom I desire to introduce to the Court, and I ask that he be permitted to be heard in this matter.

The COURT: That may be done.

Mr. CLARKE: I am willing to admit for the defendant that he was

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arrested on the 24th of June, 1910, on a complaint, but I am unable to admit that there is or was any requisition made by the Italian Government.

We will also admit that the prisoner is the Porter Charlton mentioned in the Complaint, and is the Porter Charlton mentioned in the dossier.

Mr. GARVEN: It is admitted that Porter Charlton this defendant, married Mary Scott Castle on or about the twelfth day of March, 1910 in the United States of America, and that he was her husband on the day of this alleged murder.

Mr. EDWARDS: That is admitted.

Mr. GARVEN: We will now call as a witness a Vice-consul of the Italian Government, Mr. Gustafo di Rosa.

306 GUSTAF DI ROSA, called by the State and sworn according to law, testified as follows:

Direct examination by Mr. GARVEN:

Q. You hold an official position under the Italian Government?

A. Yes.

Q. What is it?

A. First Assistant Vice Consul of Italy in New York City.

Q. I show you a paper purporting to be a dossier and ask you if you have seen that paper before?

A. Yes, I did.

Q. From whom did you get it?

A. From The Foreign Office in Rome, of the Italian Government.

Q. In your official position as Vice-Consul of the Italian Government?

A. Yes.

Q. Did you personally bring that dossier before this Court at any time during that last month or two?

A. Do you mean this one?

Q. Les.

A. This one I don't know.

Q. Or a translation of it?

A. The translation was sent by Mr. Di Marossi.

Q. Did you bring the original in this Court?

A. The first time, that I have brought it here now.

Q. Did you understand my question?

A. I did not know it.

Q. Have you heretofore presented that document which is now before you, the dossier, to Judge Blair?

A. Yes, this one, yes, for the Judge; just presented it, but not left.

Q. That document you have in your hand?

A. Yes.

Q. Did you present it to Judge Blair?

A. Yes.

Q. What day?

A. I don't remember.

Q. A month ago, or a week ago?

(Objected to)

307 Q. About when?

A. The last time you were here.

Q. Can you give us an idea of the date?

A. I don't know.

Q. Was it in September, August or July?

A. I don't remember what was the date; I think it was in September.

Q. What is it?

A. I think it was in August, but I don't remember; it is no use to ask me the date.

Q. Was that the last adjourned day of this case?

(Objected to that he cannot know it.)

Q. Do you remember whether it was the last adjourned day or not?

A. I don't remember.

Q. Was it the first part of August or the last part of August?

(Objected to as being cross examination of the State's own witness.)

Q. Was it on the 11th day of August, the last day of the hearing, you presented that to Judge Blair?

A. I can't remember the date but it was the last hearing here before the Jersey City Court.

It is admitted that the dossier was presented the first time on August 11th to Judge Blair.

Q. Did you have that dossier translated?

A. Yes.

Q. By whom?

A. By a gentleman who is here present, Mr. Caboni.

Cross-examination by Mr. EDWARDS:

Q. Who requested you to have it translated?

A. The Judge.

Q. Did you take it back with you the same day you brought it to him?

A. Yes.

Q. You did not leave it with him then?

A. No.

308 Q. Have you had it in your possession ever since?

A. Ever since.

Q. Then it was never in Judge Blair's possession—physical possession—never was in Judge Blair's physical possession, except on August 11th, when you presented it for a moment?

(Objected to as immaterial and irrelevant, and that the Court will take judicial notice of whether it was in the Court's physical possession.)

Q. You have had it in your possession ever since August 11th?

A. Ever since the last hearing, if that was August 11th.

Q. How long did Judge Blair have it in his possession?

A. I don't know.

Q. Five or ten minutes?

A. I don't remember; I did not count the minutes.

Q. You came over with the paper?

A. Yes.

Q. And you went back with it?

A. Yes.

Q. What time did you leave the office in New York?

(Objected to as immaterial. Question overruled.)

Q. Where did you give it to Judge Blair?

A. In the court house—in the other court house.

Q. You were in the Court House how long at that time?

(Objected to as immaterial. Question overruled. Exception by defendant's counsel.)

Q. Did Judge Blair give it back to you immediately after you handed it to him?

(Objected to as irrelevant and immaterial.)

The Court: He may answer as a matter of recollection.

A. I can't count the minutes.

Q. If it was less than half an hour?

A. I think it was less than half an hour.

Q. You are the Vice Consul.

A. Yes, First Vice Consul.

309 Q. Who is your superior?

A. The consul General.

Q. What is his name?

A. Farapuli.

Q. Where was he on August 11th?

A. I don't know.

Q. Was he in New York on August 11th?

A. What day is that?

Q. The day you came over with the dossier.

A. I suppose he was in New York; I can't tell that.

Q. He was not away on his vacation at that time?

A. No.

Q. Is this dossier in the same condition that it was on the day you handed it to Judge Blair?

A. Yes.

Q. Was there any mark of filing put upon this paper on that day so far as you know?

A. No.

Q. You said in your direct examination that this was sent by the Italian Government. To whom was it sent?

A. If I remember it was sent to the Embassy at Washington, but not they are at Manchester for the summer.

Q. This is all the paper that you filed or presented to Judge Blair?

A. We presented some other paper, we signed some affidavit.

Q. But the day you gave this paper to Judge Blair you gave no other paper?

A. No.

Q. And you received no other paper?

A. No.

Q. By the Italian Embassy you mean the Embassy at Washington, of the Italian Government?

A. Yes, of the Italian Government.

Redirect by Mr. GARVEN:

Q. I show you a certificate and ask you whether you presented that certificate to Judge Blair at the hearing of this case on July 8th?

A. Yes.

310 Q. Was it at the first hearing after the date of this certificate?

A. Yes.

Mr. GARVEN: I offer this certificate in evidence.

Mr. EDWARDS: One moment. Before its admission I want to examine upon it.

(It is handed to Mr. Edwards.)

Recross by Mr. EDWARDS:

Q. When did you hand this to Judge Blair? The same time you gave him the dossier?

A. No, sir.

Q. When did you hand it to him?

A. In the month of July, the second hearing we had.

Q. Can't you give us the date?

A. I can't remember very well, but I think it was the eighth.

Q. Are you sure it was in the month of July; may it not have been in the month of August?

A. No, because the month of August was when we handed the dossier.

Q. How do you know this was not handed the same time in the month of August?

A. Because this came after the extradition and the dossier came by mail. This came from the United States and the other things came from Italy.

Q. When did you give it to Judge Blair?

A. In July.

Q. What did he do with it?

A. I don't remember.

Q. Did he hand it back to you?

A. I don't remember.

Q. Who brought it in court this morning?

A. I think my assistant.

Q. Where did you have it all the time?

A. I think he has it, my assistant.

Q. How long did you leave it with Judge Blair?

A. I don't remember.

Q. Over half an hour?

A. I don't remember.

311 Q. But you took it back the same day you showed it to him.

A. I don't remember.

Q. Did you not take it back to New York?

A. It may be I did; I don't remember.

Q. But as a matter of fact don't you know it came from your office this morning?

A. If you ask me this morning I can say, but not in July.

Q. Where was it until this time?

A. I think Mr. Marosi can tell you. I can't remember.

Q. Can't you remember?

A. I have so many things to remember, I can't remember it.

Q. This was not important?

A. Everything is important but I can't remember everything, and I am not the only one.

Q. Who brought this dossier here?

A. From New York by Mr. Marosi.

Q. And was this paper with it when it was brought in the court?

A. I can't remember; I can't tell, I don't know, I just saw this dossier and handed it to Mr. Garven, but I no look to see inside because I read it in my office, you know.

Redirect examination by Mr. GARVEN:

Q. You are sure it was offered at the hearing before Judge Blair in July?

A. Yes, sir.

Recross by Mr. EDWARDS:

Q. Who offered it?

A. I did.

Q. How did you offer it?

A. How do you mean?

Q. Did you say anything to Judge Blair when you offered it to him?

A. I don't remember what I said; I handed it to him.

Q. Did you not hand him anything else?

A. How? When do you mean?

312 Q. Or was it your assistant who did that? I mean at that same time you handed him this paper.

A. I remember I signed an affidavit for the extradition.

Q. You mean an affidavit for the arrest of the accused?

A. Yes.

Q. Has not your assistant, Monterosi, had this document in your possession since you showed it to Judge Blair?

A. I don't understand that; had he had it in my possession?

Q. Has not your assistant Monterosi had this document since that time?

A. Marosi; He is not my assistant.

Q. Has he not had this in his possession for the Italian Consulate until it was presented to Judge Blair?

A. Until.

Q. Until and since?

A. No.

Q. What is his position in the office of the Consul?

A. Attache in the Consulate, sent by the Italian Government.

Q. And he is an Italian citizen?

A. Yes.

Q. And so are you?

A. Yes.

(Paper offered in evidence again by the State.)

Mr. EDWARDS: It is objected to on the ground that it does not appear to have been regularly filed either with the Court or Clerk, or Judge, or with the Secretary of State; and that it is now formally presented for the first time and is not a file of this Court, and if it is to be filed it must be filed as of this date.

Mr. GARVEN: That is not true: We have had three hearings.

The COURT: I will admit the paper in evidence.

Mr. EDWARDS: We enter an exception.

(Paper marked S/2—J. M.)

Said exception is allowed and sealed. (L. S.)

JOHN A. BLAIR, *Judge*. [SEAL.]

313 Mr. EDWARDS: I want to add another objection to S/2, on the ground that no application from the Italian Government for the issuance of this paper appears.

The COURT: The same ruling.

Mr. EDWARDS: And we extend our exception to that also.

Said exception is allowed and sealed.

JOHN A. BLAIR, *Judge*. [SEAL.]

MICHAEL CABONI, called by the State and sworn according to law, testified as follows:

Direct examination by Mr. GARVEN:

Q. Are you connected with the Italian Consul's office in New York?

A. I am not.

Q. Were you employed by the Italian Government to translate the paper I show you here, and which is marked S/3 for identification?

A. Yes.

Q. Did you translate it?

A. I did.

Q. To whom?

A. What do you mean by to whom?

Q. Did you translate it to any person or write it out yourself?

A. I wrote it myself; I wrote the translation myself.

Q. I show you a translation into English of this paper S/3 for identification and ask you whether it is a correct translation.

A. Is it correct? Well, I made it myself, and I think it is true.

Q. Is it correct or not?

A. It is true.

Cross-examination by Mr. EDWARDS:

Q. This is in typewriting?

A. Yes.

Q. Then you did not write it?

A. I wrote it in longhand and then I had it made in typewriting.

Q. Did you compare the typewriting with your hand-written copy?

A. Yes.

314 Q. And this is a correct typewritten copy of the hand-written copy that you made?

A. Yes.

Q. Are you an Italian?

A. Yes.

Q. A citizen of the United States?

A. Yes, I am naturalized.

Q. And you did this at the request of the Italian Consul?

A. Yes.

Q. Are you accustomed to make translations of Italian into English?

A. Yes: I translate for the National Association of Manufacturers of New York.

Q. And you are familiar with the Italian and English languages and translations?

A. Yes.

Q. And your translation covers the certificate and the dossier?

A. This certificate was written in English and I did not have to translate it.

Q. When did you make this translation?

A. I can have the dossier in the middle of July—last month.

Q. August?

A. August.

Q. What day was it given to you?

A. I say the middle; 13, 14 or 15.

Q. Who brought it to you?

A. I was invited to go to the Consul General's office, and the Consul General gave it to me, Mr. Farafuli.

Q. With the request to translate it?

A. Yes.

Q. How long did you have it in your possession?

A. Not a single day; I went every day to that office.

Q. How long did it take you to translate it?

A. About three weeks.

Q. When was it finished?



A. The fourth or fifth of this month, and then it took two or three more days to have it transcribed and finished.

Q. When was it finished?

A. Eighth, ninth or tenth.

Q. And when it was finished what did you do with it?

315 A. I brought it to the Consul.

Mr. GARVEN: And this is one of the copies?

WITNESS: Yes.

Q. And during all of the time of the translation you had it in the Italian Consul's office?

A. Yes; I translated it in that office entirely.

Mr. VICKERS: It is admitted that at the time of the presenting of this dossier the Italian Consul was to furnish the interpreter, by agreement, with Mr. Smith, representing the defendant.

Mr. EDWARDS: That is so.

Mr. GARVEN: We offer the dossier and the copy in English in evidence.

Mr. EDWARDS: We object to the same on the ground that the form signed "John J. Leishman, Ambassador of the United States of America to the Kingdom of Italy" is not in the form provided by the statute and the treaty, and therefore is not sufficient and is void.

2. That this dossier was not filed within the forty days required by the statute from the time of the arrest. The arrest took place, as we understand it, on June 24th. The papers were not filed, if they were ever filed, we claim that they were never duly filed and that they were not brought to this court until August eleventh, which is palpably beyond the forty days after the arrest, and therefore of no force or effect.

3. That it is not accompanied by the proper mandate or request from the Italian Government as required by the treaty.

316 Mr. CLARKE: We add the further objection that there is not presented with this dossier the formal request called for by the amendment of 1884 to the treaty, and there is not presented with it the formal demand which is required by the latter sentence of that amendment to be filed within forty days with these documents, and that there is not presented with it the warrant or deposition required in the first section.

(Mr. Clarke proceeds with his argument to sustain these objections.)

Mr. GARVEN: I maintain that the certificate and all is in accordance with the law and the treaty, and that the continuance of the matter beyond forty days was by the consent of the defendant. That is all I want to say. It is a question for the court.

The COURT: I think I will admit the certificate as in proper form if you base the objection on the use of the word "use" instead of "receive."

To which ruling the defendant prays an exception and it is allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. GARVEN: The Court admits the dossier and the certificate in evidence?

The COURT: Subject to the question of the forty day clause.

Mr. GARVEN: I am offering that in evidence and if the court sustains that that is legal evidence.

Mr. CLARKE: I don't want to argue that question of the forty days now, because that will got to the entire case, and will rest on a particular paper which has not been produced.

Mr. GARVEN: We are offering this paper in evidence now.

317 The COURT: You may argue as to the admissibility of that paper, and then I will rule on it.

Mr. CLARKE: We claim that the dossier is not admissible without all the documents that are necessary to be presented within forty days. Among them is the formal demand for extradition from the Italian Government in addition to the preliminary requisition for arrest and this formal demand must be presented within the forty days as well as that the dossier shall be presented within the forty days. Article 5 of Treaty.

There must be a formal demand within the forty days, as well as a warrant and dossier.

There must be a formal demand within forty days from the arrest, and a warrant or deposition or dossier before the prosecution makes out a case.

This treaty provides forty days, although the Act of Congress provides sixty days. The treaty being later in point of time repeals the sixty-day provision and makes it forty days for cases arising under it.

(Argument by respective counsel.)

The COURT: I will hold this question for the present and will allow you to proceed.

318 LOUIS S. WEINTHAL, called by the State and sworn according to law, testified as follows:

Direct examination by Mr. VICKERS:

Q. You reside in the City of Hoboken?

A. I do.

Q. Do you know the defendant in this case, Porter Charlton?

A. I do.

Q. When did you first see him?

A. On the North German Lloyd Dock, June 23.

Q. Did you speak to him?

A. I did.

Q. What did you say to him?

A. I asked him what his name was.

Q. What did he say to you if anything in reply to that question?

A. He said his name was Coleman.

Q. Do you mean June 23 of this year?

A. Yes.

Q. Where was it that you saw this defendant and that you had the conversation with him that you have here related?

A. On the upper deck of the dock of the North German Lloyd Steamship Company in Hoboken.

Q. On the arrival of a steamer?

A. Yes.

Q. What name?

A. Princesse Irene.

Q. Sailing between what ports?

A. From Italy to America.

Cross-examination by Mr. EDWARDS:

Q. Did this man have any luggage with him?

A. A suit case—new suit case.

Q. How was that suit case marked—any name or letters on it?

A. No; no marks that I could see; I did not see any.

Q. Did you look inside of the suit case?

A. Not at that time; I was looking at it while the Government officials were examining it.

Q. Did you notice any clothes in it?

(Objected to as not proper cross-examination. Objection sustained.)

319 Q. You were a police officer?

A. Yes.

Q. You did not tell this man that you were a police officer, did you?

A. Not at that time.

Q. And you did not warn him about any statement he might make?

A. Not then.

Redirect examination by Mr. VICKERS:

Q. You were in citizen's clothes?

A. Yes.

The stenographer's record as to the admission in evidence of Exhibit S/1 is read by the stenographer at the request of the defendant's counsel.

Mr. Clarke and Mr. Edwards claim that it was only offered as a pleading and not as evidence and that it was consented that the copy in evidence be received in the place of the original.

Mr. Garven says that the original would be evidence of the facts therein stated, and therefore the copy that is in its place is evidence of the facts.

The COURT: I will determine that hereafter.

The defendant excepts to any ruling that may be made to the effect that the complaint is evidence except of its having been filed as a complaint in this proceeding.

Mr. GARVEN: Will the court kindly pass upon the question of the admissibility of those documents, the dossier and the English copy of it? We are at a point where we will be compelled to have that question decided.

The COURT: I will permit you to use the dossier.

Mr. GARVEN: We ask a ruling on that question before the case is closed. It is marked now only for identification and we cannot close the case until we know whether it is in evidence or not; and the same is true with respect to the translation, also.

The COURT: I will look at the matter at recess.

We will take a recess now until a quarter of two o'clock.

Recess.

The COURT: I have reached the conclusion that this paper called the dossier will be admitted in evidence; and also the translation.

Mr. EDWARDS: We ask an exception on each and all of the grounds which have been stated, and it is allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

(These papers are received and marked in evidence as S/3 and S/4.)

Mr. EDWARDS: Our exception, of course, goes to the admission of the translation as well, but we don't make any dispute as to the correctness of the translation.

The COURT: Yes.

Mr. EDWARDS: We object to the admission of the translation as well as of the dossier, and except to your Honor's ruling admitting either.

Said exception is allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. GARVEN: In behalf of the Italian Government we close the case.

321 Mr. CLARKE: We make a motion to dismiss on the following grounds:

1. That while the mandate to the Secretary of State is produced, there is no proof of the form in which the original requisition for the preliminary arrest was made to the Secretary of State, nor is any copy of the original requisition proved, nor is the original requisition presented, and therefore there is no requisition proved before the court.

2. There is no proof that any copy of the warrant of arrest in Italy accompanied the original requisition for extradition, nor is there any proof of the copy of the warrant of arrest or of the warrant of arrest.

3. There is no proof that any depositions on which the warrant of arrest was issued in Italy accompanied the requisition, nor any proof that any copy of the depositions on which the warrant of arrest issued in Italy accompanied such requisition.

4. There is no proof that any formal demand for extradition supported as above provided for, together with the documents above provided was made within forty days after the arrest, nor proof of any formal demand for extradition as required by the treaty and the act of Congress.

5. There is no proof that any copy of the depositions on which the warrant of arrest was issued, or the warrant of arrest, was presented to the Secretary of State and presented to the Court within the forty days required by the law and the treaty or either; and that the complaint is not evidence of the facts in question and on its face shows no compliance with the statute or the treaty.

6. That the burden of proof is on the prosecution, in a proceeding of this kind to show that all the requirements of the treaty have been complied with and that such documents should be presented within the time required to the Secretary of State or to this Court, and they should be presented to the Secretary of State and by him filed and entered and forwarded to this Court for action; and that the prosecution has not made such proof and the documents have not been presented to this court or to the Secretary of State within the forty days required by the treaty.

7. That the documents required by the treaty have not been duly filed, made, entered or received by the United States Government, executive or judicial, within the forty days required by the treaty of 1884.

8. That the treaty does not include citizens of the asylum countries by reason of the various actions of the diplomatic departments of the two Governments, and by reason of the Italian statute, and so on, which will be proved as part of the defendant's case.

The COURT: I deny the motion.

Mr. EDWARDS: We take an exception on each and every ground above stated.

JOHN A. BLAIR, *Judge*. [SEAL.]

Said exception is allowed and sealed.

Mr. EDWARDS: We propose to produce in evidence some matter going towards the treaty and the statutes, and the court's duty thereunder, by showing that the Italian Government has denounced the treaty; that they have put upon it for a long series of years a construction to the effect that only persons who are not citizens of the asylum country can be extradited under it, and that the Government of the United States must put the same construction on it, and that it has thus actually been renounced and is no longer in force so far as concerns citizens of the asylum country.

323 In addition to this we propose to show, as a reason why the extradition should not be granted, that on the day of the date of the commission of the crime in Italy the prisoner Porter Charlton was of unsound mind to such extent that he was unable to distinguish between the right and wrong of the deed for which he has been committed; in other words, that under our law he was insane and continued in that condition of mind up to the time of his arrest. And we propose to give expert evidence on that subject, and other evidence in support of the expert evidence as to his previous life, and physical antecedents and ancestry.

We submit that we should put in the documentary evidence last and the insanity evidence first, as the witnesses are here.

We call Paul Charlton.

(Objected to.)

Mr. EDWARDS: We offer to prove by the testimony of Mr. Paul Charlton, the father of defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime, in the month of June, in Italy, this defendant was of unsound mind, that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit: that at the time of the doing of the act complained of this defendant was of such unsound mind and  
 324 was so insane as to be unable to distinguish between the right and the wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

Mr. GARVEN: It is quite evident that counsel has admitted the commission of the crime by Porter Charlton.

We object to this witness testifying to the insanity of the defendant on the ground that your Honor is sitting merely as a committing magistrate, and under the law of this State a committing magistrate will not allow the defense to go into the case on a preliminary hearing on a complaint, except that the defendant might make a statement, not under oath.

And secondly, that it is inadmissible to plead insanity in this proceeding.

And on those grounds we object to the evidence.

Mr. EDWARDS: We submit that it would be a deprivation of our rights not to hear our evidence now; and that it would be an improper thing and illegal to surrender to the Italian Government a citizen of the United States who at the time of the commission of the offense was and is now insane.

Mr. GARVEN: This court has nothing to do with the surrendering of the man. I call attention to the Wach (?) case, in which Judge Brown gave the opinion. In this case where a prima facie case is presented by the State before the committing magistrate, he holds for the grand jury; and the law in that case governs this case, and it seems to me that outside of the statement by the defendant himself the Court cannot hear any evidence. We do not object to a statement by the defendant.

Mr. CLARKE: The first question here is whether we are proceeding under State law or United States law.

325 A number of cases hold that the defense can introduce evidence, and other cases hold that the defense cannot do so; but it seems to us that the whole matter is set at rest by the statutes of the United States, Act of August 3, 1882, Section 3. There is a statutory direction there that even the cost of summoning witnesses for the defense shall be paid by the United States. And that shows that the defendant has the right to call and examine witnesses.

22 U. S. Stat. at Large, 215.

The COURT: The statute says "may."

Mr. CLARKE: The word "may" has been held to mean "must." That has been held in many cases, most frequently in the matter of costs. But this statute of 1882 expressly recognizes the propriety of a defense and provides for the proceeding.

See *Orteaza vs. Jacobus*, 136 U. S., 330.

and other cases with further argument on the law from Mr. Clarke not set forth here, as to whether evidence of insanity is admissible; if he is insane he is not before this court and cannot be extradited. It is a proper defense.

See, the Catlow case.

I may say, in this connection, that I understand from the form in which the objection is made by the learned District Attorney, that any further elaboration by us of the facts of hereditary or family history and surrounding conditions affecting defendant's mind on which the hypothetical question as to insanity was to be based, and the precise form of the offer, is waived, the point insisted upon by my friend being simply that evidence of the insanity of the defendant is not admissible.

326 Mr. VICKERS: So far as the insanity of this defendant is concerned.

Mr. CLARKE: So far as the insanity of the defendant is concerned.

The COURT: Do you suppose, Mr. Edwards, that if I were sitting as a committing magistrate on the charge of murder that the defendant would have a right to set up a defense of insanity?

Mr. EDWARDS: Not if he were being held according to our State law.

The COURT: Is not the law that is to govern, the law of this State?

Mr. EDWARDS: No; he must be tried according to the law of the country in which he is found; that includes the United States.

Thereupon while said court was still sitting upon said day in the hearing of the above matter, Mr. Edwards, of counsel for the defendant, called a witness on behalf of the defendant to testify as to certain facts material to the defense in said proceeding, said witness being competent by age and knowledge to give such testimony, and being then physically present in said court, and being presented at the bar of said court to be sworn, for the purpose of giving such testimony; and, before such witness was sworn, as above, an objection having been interposed on the part of the State to the introduction of any evidence of the insanity of the defendant.

327 And counsel for the defendant having stated orally, at the bar of the court, that he proposed to offer by the testimony of the witness then at the bar of the court and offered to be sworn, and by the testimony of other witnesses then physically present in the court, competent by age, experience and knowledge, and ready to be sworn, and to testify in this proceeding, and by this testimony to prove that the defendant, at and before the time of the



offense alleged to have been committed by the defendant was committed, and at the time of the arrest of the defendant in Hudson County, New Jersey, to wit: on June 23rd, 1910, and at the time said offer was made, to wit: On September 21st, 1910, the said defendant was, and is, insane, and irresponsible, for his acts, and further offered to prove by the testimony of Paul Charlton, the father of the defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime in the month of June in Italy, this defendant was of unsound mind, that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down

by our courts, to wit: that at the time of the doing of the  
 328 act complained of this defendant was of such unsound mind and was so insane as to be unable to distinguish between the right and wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

And the court, at said place and upon said date, having duly considered said offer of testimony on behalf of defendant, and the objection to the reception thereof, interposed on behalf of the State, having sustained the objection, and declined to permit the introduction thereof, or the production and swearing of said witnesses on behalf of the defendant, as to such facts or any of them; to which action and ruling of the court due exception was made by counsel on behalf of the defendant, and such exception having been duly noted on the records of the court; allowed and sealed.

JOHN A. BLAIR, *Judge*. [SEAL.]

And the court having granted, in open court, permission for counsel for defendant to present a statement and schedule of the facts so offered to be proven, on behalf of defendant, by said witnesses who were then physically present in court, and competent, ready and willing to testify thereto, in compliance with said permission, there is submitted for insertion in the records of this court, in the hearing of this case, a statement and schedule of the said facts so offered to be testified to, introduced and proven on behalf of the defendant, as follows:

329 That the defendant was born, and now is, an American citizen; that he was born at Omaha, Nebraska, within the United States, on September 21st, 1888; that at the time of his birth both his father and his mother were American citizens; as a child he was normal, physically and mentally, and although physically very active and adroit, apt and skillful as an athlete, he was never physically robust or strong.

As a child his temper was usually good; he was amiable, gentle, fond of company, of his family and his companions, and was well liked by every one. From his early childhood he was subject to

fits of extreme rage, upon provocation and infrequently. On one occasion, when he was of the age of fourteen years, the horse he was riding took fright and ran away with him, and when he brought the horse in both horse and rider were in a state of complete exhaustion—the horse from overriding and from laceration of his mouth by a severe bit, and of his sides and flanks from severe and cruel spurring. The boy was in hysterical rage, trembling violently and crying, and begging to be allowed to take further vengeance upon the horse, because he had been unruly, and he had to be taken from him by force. Later, during his life in boarding school, on occasions of athletic contests, on several occasions he became violently enraged and required to be restrained by force from committing reprisals on his opponents. He had, during all his life spent much time in out-

door sports and exercise, until he came to New York in December, 1908, and took a place in a bank, where his duties soon became so onerous as to require, (in his judgment) constant application at a desk from 9 A. M. to 6 P. M., and frequently until midnight, and this usually for the whole seven days of the week. In September, 1909, his associates and family began to notice a radical change in him. He became very thin, his face was grey and drawn, his temper became uncertain, and he was resentful of suggestion or control to the verge of extreme rudeness; generally the change from evenness and courtesy was so pronounced as to be noticed by every one with whom he came in contact. This change, in those regards, became more and more pronounced, until he was insubordinate to the directions of his employers, and repudiated the suggestion or control of his father, or the advice of his brother and friends. He became solitary, morose, uncommunicative. When he left his work he would lock himself alone in his lodgings, and would read works of the imagination and poetry. He ceased to visit his friends, and refused offers and invitations for entertainment in their company.

Early in the year 1910 he developed a persistent, hacking cough, expectorated almost constantly, his shoulders were drawn in, he was stooped and emaciated. He ridiculed, with resentment, the endeavors of his family to induce him to take medical advice, and to take exercise in the open air, and reduce his hours of work. His condition became alarmingly worse between his father's visits to him on February 1st and March 6th, 1910: on the latter

331 date he was in a state approaching physical collapse, his breathing was oppressed, and his sputum tinged with blood. He was put to bed, and consented to consult a physician the next day. After examination, it was found, from his sputum and an X-ray photograph, that he was suffering from incipient tuberculosis, and he was advised that life in the open air, with practically hospital surroundings, would be necessary to save his life. Arrangements were at once made for the termination of his employment on April 1, and permission had been obtained for his admission to the tuberculosis hospital of the United States Army, at Ft. Bayard, New Mexico, to which he gave ready assent.

Coming to New York to see him to make final arrangements, his father met him at the 23d St. Ferry and told him he was in a great

hurry to keep a dinner engagement. On the way from the ferry in a cab, he told his father that he had been privately married, on March 12th, 1910, to a woman slightly older than he, who had been forced to divorce her husband, but who was the brightest, prettiest, most charming lady in the world.

Instead of driving to the place of his father's engagement, the cab was driven to "The Woodward Annex," an apartment hotel at 55th Street and Broadway, where the defendant and his wife, Mary Scott Castle Charlton, were then living. Mrs. Charlton was, apparently at least twice the age of her husband, was vivacious, and had the appearance of intense vitality, in marked contrast to her husband, who was stooped, with drawn face, a constant, irritating cough, and was noticeably under the domination of his wife. After a short interview, the father proceeded to his engagement, and returned to the hotel about midnight.

332 At the interview which followed the father made respectful inquiry of the wife in relation to her family, her life and career, including her former marriage, which had been dissolved by divorce, and also as to the resources of the husband and wife, the husband having no private means,—except as furnished by his father—and being out of employment.

These natural and necessary questions were resented by the wife and the interview terminated in about half an hour in her withdrawal with her husband, in a highly hysterical condition. Offers of assistance by the father were refused, in violent words by the husband and wife.

Similar offers were refused on the following morning as were invitations by telephone from the father to the wife and husband to lunch and dine with him on that day.

Mr. and Mrs. Charlton did, however, dine on the evening of March 29, 1910, at the Hotel Lafayette, 9th St. and University Place, with the father and a gentleman friend, at which time the wife drank without moderation, white wine, and after dinner, furnished at her request, two large goblets of "dropped absinthe" in ice.

The father did not again see Mr. and Mrs. Charlton, or either of them, prior to their sailing from New York for Genoa on the S. S. "Duca D'Aosta," on Saturday, April 16, 1910.

The father did, however, receive from his son on or about April 6, 1910, a letter so full of foulness and abuse that the father destroyed it unread, except a glance through it to see its purport and phraseology.

333 The latter were entirely unlike any diction, oral or written, that the son had ever been known to use; he had hitherto been a purist in the use of language, and extremely refined in both conversation and correspondence, while the letter was full of phrases of the gutter, such as would be used by the most abandoned person. Aside from abuse of the father the letter contained the most extravagant eulogies of the wife.

A similar letter, equally strange and foul, was received by the father from the son in Italy about May 16th, 1910, which was like-

wise destroyed unread except for a glance to learn its purport and phraseology, which like that of the former letter, was abusive, foul, insulting and utterly, radically, different in those qualities, and in its rambling incoherence, from anything his father had ever known him speak or write. Both the letters bore convincing internal evidence of having been dictated rather than originated by the writer.

He wrote two similar letters to one of his brothers—one before he sailed for Italy and one on or about May 18th, 1910, both full of abuse of his family and eulogies of his wife. Both these letters were destroyed after being glanced over to see if they contained any important statement as to his health or plans, which neither of them did.

These were the only communications received by his family after he sailed for Italy and up to the day of his arrest at Hoboken, on June 23rd, 1910. His father saw him at Police Headquarters, Hoboken, N. J., on the night of his arrest; when there were also present: Mr. Hayes, Chief of Police; several officers, Recorder McGovern, by whom he had been committed; Dr. William J. Arlitz,

the police surgeon, R. Floyd Clarke, Esqre., his counsel, and  
334 Robert Charlton, his brother.

On this occasion he was in a state of hysterical exaltation: he refused to greet or speak to his father; and no apparent appreciation of the gravity or seriousness of his situation; was incoherent in his statements, and talked freely in a rambling, disconnected manner to all the persons present, and was palpably, to any observer, not of sound mind.

When he arrived at the dock in Hoboken he left the steamer, carrying two suit cases, one of which was marked with the initials "P. C.," and submitted them to the examination of the customs officials, although they contained toilet articles and wearing apparel marked with his name or initials, letters addressed to him, and visiting cards bearing his name.

His demeanor at the time of his arrest, preliminary examination, etc., was such as to convince the Police Surgeon, that he was demented.

#### *Family History of Porter Charlton.*

1. The maternal grandfather of defendant died at the age of between 35 and 40 years, of chronic alcoholism.

2. The brother of the foregoing (No. 1), was a paranoic for years before his death and died in that condition.

3. The sister of the foregoing (Nos. 1 & 2), had a daughter afflicted with epilepsy, who died in epileptic-form convulsions at the age of about 32.

4. The maternal uncle of defendant, now 51 years old, is of a stubborn and brutal nature; was educated as a chemist; became a pharmacist; wasted his estate on a low connection with a woman much older than himself; contracted drug habits; and has lived an  
eccentric and immoral life since the age of 21 years; en-  
335 tirely cut off from associates of his own class.

5. A near relative of his mother's blood, now living, has had periodic explosions, of attacks of epilepsy for many years.

6 A younger brother of defendant, at the age of 15 years, accidentally shot and killed a playmate to whom he was devotedly attached, but after his first paroxysm of grief—within three days—seemed to forget the accident; never referred to it; has since gone about his daily life as if it had not happened, and, so far as can be observed, has remained indifferent.

*Some Medical History of Mary Scott Castle Charlton.*

1. Within three years was confined to an institution in the City of New York, suffering from erotic insanity—uncontrollable desire for the society of men.

2. Within two years last past, and up to the time of her departure for Italy, was under the treatment of two physicians of the City of New York for alcoholism, and uncontrollable, hysterical outbursts of rage. On learning of her proposed marriage to defendant both physicians endeavored to have disclosure of these facts made to defendant, but were unsuccessful. The foregoing is important and material, as explaining the physical and mental condition of the defendant as disclosed to the alienists who have had him under observation since his arrest.

336 *Opinion of Physicians—Experts in Mental Diseases.*

Defendant has been under the observation of Dr. William J. Arlitz, Hoboken, New Jersey, from the hour of his arrest on June 23, 1910; and of Drs. Allan McLane Hamilton and Edward D. Fisher since June 24, 1910.

They have, singly and together, made frequent and exhaustive examination of the mental and physical condition of the defendant from the above dates until the present, and they are unanimously and strongly of the opinion that, at the date of the crime alleged to have been committed by the defendant, and at the date of his arrest in the United States, and at the present date, the defendant was and is, suffering from an exhaustive psychosis due to sexual excesses; that his moral sense is pathologically defective; that he is of unsound mind and liable to attacks of impulsive violence, which explosions are beyond his control and are due to hysterical stigmata and epileptiform seizures, during which he was not and is not responsible; that his whole condition shows a degree of weakmindedness, disregard for his personal safety, and liability to violent explosion at any time, which is to be looked for in a person of his constitutional mental weakness.

The said expert physicians and alienists who have examined the defendant since he has been in custody will depose that in their opinion this defendant, at the time of the commission of this alleged crime in the month of June in Italy was of unsound mind, and that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and that in

their opinion, conforming with the tests of responsibility laid down by our courts, this defendant at the time of the doing of the act complained of was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of the act, and that this condition existed some time previous to the commission of the alleged crime and continued up to and including the time when he was arrested.

These physicians recommend that he should be taken to a hospital for the insane, and there kept indefinitely, as he is at any time likely to be a menace to society.

The defendant, by his counsel offers to prove the facts, and each of them, set forth in the preceding schedule or statement, by the competent, relevant and material testimony of witnesses now physically present in court, and qualified by age, knowledge, and experience to testify to the same, and each of said facts, and to the results and conclusions and opinion necessarily and legally following therefrom.

Thereupon the Court ruled:

The COURT: I have reached the conclusion, on the subject of insanity as a defense in this matter that I will not hear it. I do not think we ought to go into the subject of the insanity of the defendant, and therefore over-rule the offer of the defense.

Exception taken by defendant, and allowed and sealed.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. EDWARDS: It is conceded that the defendant was at the time of the alleged commission of the alleged crime and is now and was at the time of his arrest, an American citizen.

Mr. GARVEN: Yes, we agree to that.

Mr. CLARKE: I desire to prove by "United States Foreign Relations" of 1890, certain documentary evidence in regard to the diplomatic correspondence between the United States and Italy in regard to the construction of this treaty.

Volume of Congressional Record of 1890, page 555, the letters of Baron Fava and of Mr. Blaine. Copies will be furnished.

(Objected to as irrelevant and immaterial in this hearing as to what construction the State Department or other Department- has placed upon the treaty.)

Mr. CLARKE: The object of the offer is to show the international situation in regard to this treaty. We wish to prove in connection with the treaty the interpretation placed upon it by the parties. The letter is after the making of the treaty; and we wish to show what attitude each government to the treaty has assumed.

The COURT: I think I will hear it. I am inclined to have you put that in. If it was not in it would be useful in argument, anyway.

Mr. GARVEN: Our position is that the treaty and extradition acts speak for themselves; and it seems to me that this correspondence should have no bearing as to how the committing magistrate should construe the treaty and that act.

Mr. CLARKE: The letter of Baron Fava to Mr. Blaine, Secretary



of State, is dated April 20, 1890, and is at pages 555 et seq. of the "Foreign Relations of the United States of 1890." (A copy is presented and admitted in evidence, and marked "Defendant's Exhibit A.")

Mr. Blaine's letter as Secretary of State to Baron Fava, Italian Minister, is June 23, 1890, in the same volume, pp. 559 to 566 inclusive. (A copy is presented and admitted in evidence and marked "Defendant's Exhibit B.")

Baron Fava to Secretary of State Blaine, July 3, 1890, *idem* 567, (a copy is presented and admitted in evidence and marked "Defendant's Exhibit C")

The important part is simply in regard to the case of Salvatore Palladina, which occurred in 1888. He committed a murder here and fled to Italy, and his extradition was then demanded and refused; but it first appears in the diplomatic correspondence in 1890, in the case of Bevivino and Villela.

We submit, also the case of Del Zoppo & Rinaldi, "Foreign Relations of 1894", pages 370, 371, 373, letters from McVeagh, Secretary of State, To Gresham, April 10, 1890. A copy is presented and admitted in evidence, and marked "Defendant's Exhibit D."

Also the Di Blasiv case, which is here in manuscript. I offer in evidence the letter of Edwin F. Uhl, Acting Secretary, dated February 18, 1894.

(Letter admitted and marked "Defendant's Exhibit E".)

Letter of John Hay, Secretary of State, to the Governor of Massachusetts, February 11, 1899—here also in manuscript.

(Letter admitted and marked "Defendant's Exhibit F".)

Said exhibits are all attached and marked as stated.

The said defendant's Exhibit E is here inserted and reads as follows:

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#### DEFENDANT'S EXHIBIT E.

##### Copy.

DEPARTMENT OF STATE,  
WASHINGTON, *February* 13, 1894.

His Excellency the Governor of the State of New York, Albany, New York.

SIR: Referring to the Department's telegram of the 27th ultimo, I have the honor to enclose herewith for your fuller information, a copy of the reply of the Italian Minister of Foreign Affairs to the request of this government for the provisional arrest of the fugitives Delzoppo and Rinaldi.

The concluding paragraph of the minister's note indicates that the Italian Government will not surrender the fugitives but will try them in Italy. This is in accordance with their action heretofore when the extradition of Italian subjects has been requested.

I have the honor to be, Sir,

Your obedient servant,

(Signed)

EDWIN F. UHL,  
*Acting Secretary.*



Enclosure: Copy of Enclosure No. 3 with No. 161, Jan. 26, 1894, from the Minister at Rome.

Said defendant's Exhibit F is here inserted and reads as follows:

DEFENDANT'S EXHIBIT F.

Copy.

DEPARTMENT OF STATE,  
WASHINGTON, *February 11, 1899.*

341 His Excellency the Governor of Massachusetts, Boston,  
Massachusetts.

SIR: I have the honor to acknowledge the receipt of your letter of the 8th instant relative to the extradition of the alleged murderer Di Blasi, whose provisional detention at Palermo, Sicily, this department recently asked at your request.

As it appears that Di Blasi is an Italian subject the Department is of the opinion that it would be useless to incur the expense of sending an officer to Italy to endeavor to secure his return. Our extradition treaty with Italy provides for the surrender of "persons" charged with crime, and no express exemption is made of citizens. This government has taken the view that where no exception is expressed, in the treaty the obligation to surrender "persons" includes citizens or subjects of the contracting parties. The Italian Government, however, declines to accept this view, and uniformly refuses to surrender its subjects, usually accompanying its refusal with an offer to try and punish the fugitives in Italy, as may be done under Italian law.

I have the honor to be, Sir,

Your obedient servant,

(Signed)

JOHN HAY.

Mr. CLARKE: I now produce the Italian Penal Code, and offer it in evidence, and offer the title page "Code Penale", and the proclamation under which it was proclaimed, dated at Rome, June 30, 1889, to take effect on the first day of January, 1890, and refer particularly to Article 9 of that code, the first phrase of which  
342 article, when translated, means, "No Italian citizen shall be extradited."

The same is marked "Defendant's Exhibit G", and is annexed.

And the following, omitting the title page and proclamation, is an extract from Exhibit G, giving the Italian text of Article 9 of the Code and translation thereof, inserted as follows:

*"First Book.*

## Libro Primo.

## Dei Reati e delle Pene in Generale.

## Titolo I.

## Dell' Applicazione della Legge Penale.

\* \* \* \* \*

## 9. Non e ammessa l'estradizione del cittadino.

L'estradizione dello straniero non e ammessa per i delitti politici, ne per i reati che a questi siano connessi.

L'estradizione dello straniero non puo essere offerta ne consentita se non dal governo del Re, e previa deliberazione conforme dell' autorita, giudiziaria del luege in cui lo straniero si trovi.

Nondimeno, su domanda od offerta di estradizione puo essere ordinate l'arreste provvisorio dello straniero.

\* \* \* \* \*

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*Translation of Above.**"First Book.**First Book.*

## Concerning Crimes and Penalties in General.

## Title I.

## Of the Application of the Penal Law.

\* \* \* \* \*

9. The extradition of a citizen is not permitted (conceded—ammessa).

The extradition of an alien is not permitted (conceded—ammessa) for political offenses, nor for crimes connected with political offences.

The extradition of an alien can neither be offered nor granted except by the government of the King, and after previous deliberation in conformity with the judicial authority of the place in which the alien is found.

However, upon demand or offer of extradition, the provisional arrest of an alien may be ordered.

\* \* \* \* \*

Mr. GARVEN: All of the Code is objected to as immaterial and irrelevant, but objection is not made to the manner of proof nor to the authenticity of the volume.

The COURT: The Code may go in evidence.

(Code received in evidence as Defendant's Exhibit G, and is annexed.)

Mr. EDWARDS: It is admitted as follows: Porter Charlton, the defendant, was born at Omaha, Nebraska, September 21, 1888; he was born of American parents, American ancestry, all citizens of the United States; he is a citizen of the United States, and voted in the mayoralty election in New York City in the election of November, 1909.

Mr. GARVEN: No. We claim there is no defense here, and therefore there can be no admission, but we allow the offer to go on record, and the facts are not disputed.

Mr. EDWARDS: Let us get it right. Counsel for the defendant states the following facts:

Porter Charlton was born in Omaha, Nebraska, September 21, 1888, both of his parents were American citizens; he is a citizen of the United States and of the State of New York; he voted in the mayoralty election in New York City in November, 1909. Further proof beyond this statement is waived, but the State insists that the facts are irrelevant and immaterial.

The COURT: Is there anything further?

Mr. EDWARDS: That is our case, and we ask now, on the grounds now stated, for the discharge of Mr. Charlton.

Mr. CLARKE: We move to dismiss on the following grounds.

1st. That while the mandate of the Secretary of State is produced, there is no proof of the form in which the original requisition for the preliminary arrest was made upon the American Government, nor is there any copy of such original requisition presented.

2nd. There is no proof that any copy of the warrant for his arrest in Italy accompanied the original requisition for extradition, nor is there any proof of any copy of any such warrant, or of the warrant of arrest.

3rd. There is no proof that any copy of the depositions on which the warrant of arrest was issued in Italy accompanied the requisition, nor any proof that any copy of the despositions on which the warrant of arrest issued in Italy accompanied such requisition.

4th. There is no proof of any formal demand for the extradition of Porter Charlton, supported as above provided, and together with the documents above provided, was made within forty days after the arrest, or was made at any time prior to this hearing, nor is there any proof of any formal demand for the extradition of Porter Charlton as required by the treaty and the act of Congress.

5th. There is no proof that any copy of the depositions on which the warrant of arrest was presented to the Secretary of State or presented to this Court within the forty days required by the treaty, or up to the time of this hearing, and that the complaint is not evidence of any of the facts stated in it and in any event, on its face shows no compliance with the requirements of the statute or the treaty.

6th. That the burden of proof is on the prosecution in a proceeding of this kind to show that all the requirements of the treaty have been complied with and that all such documents have been

presented within the time required to the Secretary of State or to this Court, and that such documents should be presented to the Secretary of State and by him forwarded to this court for action, 346 and that the prosecution has failed to show or make proof that any such documents have been presented to this court or to the Secretary of State within the forty days required by the treaty, or up to the time of this hearing.

7th. That the documents required by the treaty have not been duly filed, made, entered or received by the United States Government, executive or judicial, within the forty days required by the treaty of 1884, or according to the treaty.

8th. That the treaty does not include citizens of the asylum countries by reason of the various actions of the diplomatic departments of both governments, and by reason of the Italian statute, Article 9 of the Penal Code of 1890.

9th. That Charlton, being a citizen of the United States, under the diplomatic correspondence which has taken place between the two governments respecting the construction of the treaty and of Article 9 of the Italian Penal Code of 1890, the treaty, so far as it applies to citizens of the asylum country, has been denounced and broken by Italy, and under the circumstances there is no jurisdiction in the Courts or the Executive to extradite, there being no obligation, under the treaty, to extradite.

Mr. CLARKE: And on the further ground that the treaty does not apply to citizens of the United States and that the court has no jurisdiction because of that fact, we ask his discharge for those reasons.

The COURT: I ought, perhaps, to examine into the question that is raised by the correspondence in reference to this treaty.

347 Mr. CLARKE: In respect to the power of the Secretary of State or of this court to extradite under the circumstances which have arisen under this treaty I desire to be heard fully. Does your Honor desire to hear me now?

Mr. GARVEN: I ask your Honor to hold that the evidence here is sufficient to sustain the charge, and that you issue a warrant for the commitment of Porter Charlton to the jail, there to remain until such surrender is made as provided by the statute.

I presume the defense has no further testimony in this case?

Mr. EDWARDS: Nothing further.

Testimony closed.

Mr. CLARKE: I will now proceed with my argument on the case.

(Mr. Clarke goes on with his argument, and Mr. Garven answers the argument, and Mr. Clarke replies.)

Hudson County (New Jersey) Court of Oyer & Terminer.

STATE  
VS.  
PORTER CHARLTON.

*Extradition Proceedings.*

FRIDAY, October 14th, 1910.

This matter came on before Honorable John A. Blair, Judge, sitting as a committing magistrate, in the Court House in Jersey City, on this fourteenth day of October, Nineteen hundred and ten.

348 Mr. Pierre P. Garven, Prosecutor of the Pleas of Hudson County, and Mr. George T. Vickers, First Assistant Prosecutor of the Pleas of the said County, appeared for the State.

Mr. William D. Edwards and Mr. Edwin F. Smith appeared for the accused.

The prisoner, Porter Charlton, was brought to the bar of the Court by the Sheriff.

The COURT: The matter of the proceedings in respect to the extradition of Porter Charlton is before me for decision. I will now dispose of this matter. My findings and conclusions are as follows:

It is either proved or admitted that Porter Charlton, the accused, is an American citizen; that in March, 1910, he married Mary Scott Castle; that on the tenth day of June, 1910, the body of the wife of the accused was found, in the waters of Lake Como, in Italy, murdered; that on the arrival of the North German Lloyd steamship "Princess Irene" in Hoboken on June 23rd, 1910, the accused was arrested upon complaint of Gustafo Di Rosa, Vice Consul of the Italian Government in New York, charged with the murder of his wife, and is now and has since that time been confined in the Hudson County Jail, and that the Italian Government has made requisition upon the United States Government for his extradition.

The present proceeding is the hearing on said complaint for the detention of the accused pending further action by the Department of State of the United States, and on behalf of the defendant for his discharge and release upon the following grounds:

1. That there is no legal and sufficient evidence to hold him in restraint; and
- 349 2. That the treaty between the governments of the United States and Italy, under which he is sought to be extradited, was not originally applicable to the case of the accused; or, if it was applicable, diplomatic correspondence since had between the two governments has made the treaty void and inapplicable to the case under consideration.

The Court in this case sits as a committing magistrate, to determine whether the evidence sufficiently established the probable guilt of the accused, and his powers as such are well defined in the case of Benson vs. Mahon, 127 U. S. Rep., 457, in which Mr. Justice Miller says:

"Taking the provision of the treaty, and that of the Revised Statute 5270, we are of the opinion that the proceeding before the Commissioner, or Committing Magistrate, is not to be regarded as in the nature of a trial by which the prisoner could be convicted or acquitted, of the crime charged against him; but rather of the character of those preliminary examinations which take place every day in this Country before an Examining or Committing Magistrate, for the purpose of determining whether a case is made out which would justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceedings on which he shall be finally tried upon the charges made against him."

Acting within the rule thus laid down, the Court finds that there is such evidence of criminality presented to it, as, according to the law governing this matter, justifies the holding of the accused; and the motion to discharge on the ground of insufficiency of evidence, is, therefore, denied.

350 The motion to discharge is urged on the further ground that the extradition treaty between the governments of the United States and Italy, if ever applicable to this case, is not so now, by force of the diplomatic correspondence of the Secretaries of State of the respective governments presented to the Court, and by a Legislative act of the Italian Government, known as the "Code Penale," passed subsequent to the making of the treaty, that "No Italian citizen shall be extradited."

Considering the grave character of the charge, and the international importance of the question involved, the Court is not willing, upon that ground, in this preliminary inquiry, notwithstanding the able and ingenious arguments of counsel to declare void a solemn treaty between the interested nations; and the motion to discharge is refused.

The accused will be remanded to the County Jail, there to remain until released in the manner provided by the statute.

Mr. EDWARDS: We desire to enter an exception to the findings of your Honor on each of the two grounds, and to your decision thereon. We ask for an exception on each ground.

Exception allowed.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. EDWARDS: We also except to the refusal of the Court to discharge the accused on each of the nine grounds for dismissal above set forth.

Exception allowed on each ground.

JOHN A. BLAIR, *Judge*. [SEAL.]

Mr. EDWARDS: A ruling is now requested upon the point reserved by the Court as to Exhibit 'S1.'

351 Judge BLAIR: I will admit the copy of the Exhibit 'S1' as proof of the fact that a complaint was made. I do not admit it as evidence or proof of the facts therein sworn to.

JOHN A. BLAIR, *Judge*. [SEAL.]

The following commitment was signed by Judge Blair and the prisoner, Porter Charlton, was thereupon removed by the Sheriff.

Hudson Court of Oyer & Terminer.

In the Matter of the Application of PORTER CHARLTON under the Treaty Between the United States of America and the Kingdom of Italy.

HUDSON COUNTY, ss:

[SEAL.]

The State of New Jersey to the Sheriff and Constables of the County of Hudson:

We command that you take the body of Porter Charlton, against whom a complaint is made under oath, charging said Porter Charlton being found within the limits of the State of New Jersey, with having, on or about the 7th day of June, A. D. 1910, at Moltrasio, in the Kingdom of Italy, committed the crime of murder upon his wife, Mary Charlton, within the jurisdiction of the Kingdom of Italy; and evidence of criminality having been heard before me and by me considered; and upon the said hearing sufficient evidence having been presented to sustain the charge, under the provisions of a certain Treaty between the Governments of the United States of America, and of the Kingdom of Italy; and you are commanded him to convey to the keeper of the Common Gaol of the said County of Hudson who is hereby required him  
352 safely to keep until he shall be surrendered to the Kingdom of Italy, under warrant from the Government of the United States, or until he be thence discharged by due course of law.

Witness: Honorable John A. Blair, one of the Justices of the Court of Common Pleas, in and for the County of Hudson, and in the absence of a Justice of the Supreme Court, sitting in and holding said Court of Oyer and Terminer, this fourteenth day of October, Nineteen hundred and ten.

JOHN A. BLAIR, *Judge*.

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EXHIBIT S. 1.

In the Matter of the Application for the Extradition of PORTER CHARLTON under the Treaty Between the United States and the Kingdom of Italy.

To the Honorable John A. Blair, one of the Judges of the Court of Oyer and Terminer in and for the County of Hudson, State of New Jersey:

Gustafo Di Rosa, Vice-Consul for the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, being duly sworn deposes and says, upon information and belief:



First: That one Porter Charlton did heretofore to wit: on or about the seventh day of June, nineteen hundred and ten, at Moltrasio, in the Province of Como, in the Kingdom of Italy, one Mary Charlton wilfully feloniously and of his malice aforethought kill and slay, by striking, beating and wounding the said Mary in and upon the head and body with a certain mallet held by him the said Porter Charlton, thereby and therewith beating the — Mary into unconsciousness and insensibility from which she did not recover consciousness before the body of her the said Mary was placed by the said Porter Charlton into a trunk, which he the said Porter Charlton threw from a certain dock into a lake known as Lake Como.

And that deponent has obtained his information from telegrams, letters, cablegrams and other correspondence from the Secretary of the Interior of the Kingdom of Italy addressed to the Consul General of Italy of this jurisdiction and further from a statement made by the said Porter Charlton and taken down in writing and signed by him in the presence of witnesses, which said statement is in effect and of the following tenor to wit:

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Police Department, City of Hoboken.

STATE,

*vs.*

PORTER CHARLTON.

CITY OF HOBOKEN,

*County of Hudson, State of New Jersey:*

The voluntary examination of the above named defendant, Porter Charlton, charged with fugitive from justice, taken before me, Patrick Hayes, Jr., Chief of Police of the City of Hoboken, after the said defendant has been duly cautioned as to his rights and privileges.

My name is Porter Charlton. I live at 204 West 55th St. N. Y. City. I am 21 years of age; I was born — Omaha, Neb. I am married; my occupation is bank clerk. In reference to the charge made against me;

My wife and I lived very happily together. She was the best woman in the world to me. But she had an ungovernable temper and so had I. We frequently quarrelled over the most trivial matters and her language to me was very foul, language that I know she did not — the meaning of, I am sure. The night I struck her, she had been quarrelling with me. It was the worst temper I ever saw her in. I told her that if she did not cease, I would put a stop to it. She quit for a while and after a short time renewed her abuse of me. I was dazed and struck her with a sort of mallet that I had been using to straighten out the leg of the couch we had been using. I struck her two or three times and thought she was dead. I then placed her body in the trunk and threw the mallet in also. About 12 o'clock that night I removed the trunk from the house and

dragged it down to a small pier near the house and threw it overboard. I remained at Moltrasio the next day and left there  
 355 the following night. I went to Como and from there to Genoa where I took the steamer Princess Irene about four days later. The room where I killed her was a sort of an out-door sleeping apartment.

## PORTER CHARLTON.

I have been informed that Mr. C. N. Ispolatoff has been implicated in this matter but wish to say that this gentleman is absolutely guiltless. I have no defense to make and wish none.

## PORTER CHARLTON.

PATRICK HAYES, JR., *Chief of Police.*

THOMAS GARRICK,

MICHAEL FALLON,

LOUIS S. WEINTHAL.

The offense here above described is within the crimes contained in the treaty heretofore referred to.

That said Porter Charlton has fled from said Kingdom of Italy and is now held in custody by the Police Department of the City of Hoboken, in the County of Hudson and State of New Jersey.

That a request for the extradition and rendition of the said Porter Charlton by the Government of the United States to the Government of the Kingdom of Italy has been made upon the Secretary of State at Washington, D. C., by Marquis Paolo di Montagliari, Italian Charge de Affaires at Washington, D. C.

Therefore deponent prays that a warrant and commitment for the person of said Porter Charlton may issue out of your Honorable Court, whereby he may be apprehended and confined in the common jail in and for the County of Hudson until thence discharged by due process of law or rendered by the Government  
 356 of the United States to the Kingdom of Italy.

## GUSTAVO DI ROSA.

Sworn and subscribed to before me, a Magistrate in and for the County of Hudson in the State of New Jersey, at the City of Jersey City, on the twenty-fourth day of June, A. D. nineteen hundred and ten.

JOHN A. BLAIR, *Judge.*

357 Department of State to any Justice of the Supreme Court of the United States; any Judge of the Circuit or District Courts of the United States in any District; any Judge of a Court of Record of General Jurisdiction in any State or Territory of the United States, or to any Commissioner specially appointed to execute the provisions of Title LXVI of the Revised Statutes of the United States, for giving effect to certain treaty stipulations between this and foreign Governments, for the apprehension and delivering up of certain offenders:

Whereas, pursuant to existing treaty stipulations between the United States of America and Italy for the mutual delivery of crim-

inals, fugitives from justice in certain cases, Marchese di Montagliari, Charge d'Affaires of Italy has made application in due form, to the proper authorities thereof, for the arrest of Porter Charlton charged with the crime of murder and alleged to be a fugitive from the justice of Italy and who is believed to be within the jurisdiction of the United States.

And Whereas, it appears proper that the said Porter Charlton should be apprehended, and the case examined in the mode provided by the laws of the United States aforesaid.

358 Now, Therefore, to the end that the above named officers, or any of them, may cause the necessary proceedings to be had, in pursuance of said laws, in order that the evidence of the criminality of the said Porter Charlton may be heard and considered, and, if deemed sufficient to sustain the charge, that the same may be certified, together with a copy of all the proceedings, to the Secretary of State, that a warrant may issue for his surrender, pursuant to said treaty stipulations, I certify the facts above recited.

In Testimony Whereof, I have hereunto signed my name and caused the seal of the Department of State to be affixed.

Done at the City of Washington, this 28 day of June, A. D. 1910, and of the Independence of the United States the 134th.

[SEAL.]

(Signed)

P. C. KNOX,

*Secretary of State.*

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# DEFENDANT'S EXHIBIT "A."

Baron Fava to Mr. Blaine.

*(Translation.)*

ROYAL LEGATION OF ITALY,

WASHINGTON, April 20, 1890.

*(Received April 23.)*

MR. SECRETARY OF STATE: The note which you did me the honor to address to me on the 21st ultimo, contains two points. The first has reference to compliance with the two letters rogatory which I addressed to you on the 19th ultimo, relative to the trial in Italy of Bevivino and Villella, and the second, to the extradition of these two Italian subjects, which has been asked for by the United States Government.

As regards the first point, you are pleased to state that, with a view to preventing, if possible, the ends of justice from being wholly defeated in the case of the two criminals in question, you have sent the two aforesaid letters rogatory to the Governors of the States of Pennsylvania and New York for such action as they may deem proper. While thanking you for this information, I beg you to permit me to remark, Mr. Secretary of State, that it is for the very purpose of preventing the ends of justice from being in any way defeated, and in order that justice may be more fully administered (this point cannot be contested), that Bevivino and Villella are now imprisoned in Italy, so that they may answer, before the courts of

their country, for their complicity in the murder committed by Michele Rizzolo, and that the Chamber of Indictments of the Court of Appeals at Catanzaro is now expecting to receive from the courts of the United States the documents which it asked for by the letters rogatory in question. In this connection, I must even renew my request that you will use your good offices in order to accelerate so far as possible, the transmission of the said documents to this Royal Legation. It is highly important that Bevivino and Villella, who have been in prison for a year, should be speedily tried; and it only depends upon the American judicial authorities to hasten their trial by promptly transmitting these documents.

In the second part of the note to which I am now replying Your Excellency is pleased to remind me that the United States Government in pursuance of the treaty existing between the two countries, applied more than a year ago for the extradition of Bevivino and Villella, and that the Royal Government refused to surrender these two persons on account of their Italian nationality. Your Excellency adds that the treaty contains no exception in favor of Italian subjects or American citizens but that it permits the extradition of all persons in general and that consequently while you transmit the aforesaid letters rogatory to the authorities of the States of Pennsylvania and New York, you must reserve the right, to which you consider the United States Government entitled, to secure the extradition of Bevivino and Villella, in order that they may be tried in the country in which they committed the crime.

It is wholly unnecessary for me to remind Your Excellency that this question has been discussed at length and entirely settled by the Royal Ministry of Foreign Affairs and the United States Legation at Rome.

Mr. Stallo must have informed the Honorable Department of State that, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, that is to say, from that of the judges of his own country; and that, although an exception is naturally made to this principle, when a citizen who has committed a crime in a foreign country is arrested in that country, it nevertheless resumes its force when the same citizen returns to his country. The new Italian penal code, in its 9th article as well as the former code in its 5th and 6th articles, are equally explicit on this subject. They solemnly declare that 'the extradition of a citizen is not admissible.'

This system — has been adopted by a majority of the nations of Europe, and the object of which is, not to alter the personal penal status of the citizen, has, during the past fifty years, been most thoroughly examined by writers on international law. All publicists agree in admitting that this principle now forms a part of public law, in virtue of which the governments of continental Europe never grant the extradition of their own subjects.

This principle, moreover, has not only become part of the public law of Europe, but it has, I am happy to say, been recognized by the United States Government itself in the extradition treaties

which it has concluded with Austria-Hungary (Article 2), the Grand Duchy of Baden (Article 2), Bavaria (Article 3), Belgium (Article 5), the Republic of Haiti (Article 41), Mexico (Article 6), the Netherlands (Article 8), Turkey (Article 7), Prussia (Article 3), and with it the German Empire in virtue of accession by subsequent treaties, Spain (Article 8), Sweden and Norway (Article 4), and Salvador (Article 5).

362 In view of the explicit provisions of the Italian law and of the practical recognition of this principle of universal public law, on the part of the governments of Europe and that of the United States, it cannot be claimed on the ground of the lack in the treaty between Italy and the United States of an express reservation in favor of natives of the two countries, that Italy has renounced a doctrine which is based, not only on her own laws, but also on her own public law. If the negotiators of the extradition treaty of 1868 had wished to abrogate this universally accepted doctrine which has been especially adopted by the two contracting parties, they would certainly, in consideration of its gravity and importance, have stated that fact in a formal declaration, adding to the words of the first article of said treaty the following clause: 'without excepting their respective citizens.'

Under these circumstances, the government of the King is perfectly justified in declaring, as it has already done, that neither the spirit of the Italian law, nor even the text of the treaty invoked by Your Excellency, would permit it to comply with the request which has been made for the extradition of the Italian subjects, Bevivino and Villella.

There is no ground whatever for the inference, from the foregoing, that the guilty parties would, for that reason, escape punishment for the crime committed by them. Any insinuation on this subject would be out of place, since it is a notorious fact that the Italian magistrate at once recognized his own competency; that he immediately proceeded to arrest the accused parties, who are now in prison; and that he commenced a regular judicial action against them without delay. That judicial action would have terminated by this time if the courts of Pennsylvania had

363 promptly complied with the request of the Italian judicial authorities, who requested them early in 1889 to forward papers in the principal case, which was closed in the United States by the sentence of Michele Rizzolo to capital punishment.

The United States Legation at Rome has been very fully informed of the contents of the present note, and it is only to answer the objections which the United States Government has now thought proper to make to the course pursued by the Royal Government in this matter, that I have had the honor to repeat to your Excellency the consideration to which the King's government did not fail at the proper time to call Mr. Stallo's attention.

Be pleased to accept, etc.,

FAVA.

## DEFENDANT'S EXHIBIT 'B.'

Mr. Blaine to Baron Fava.

DEPARTMENT OF STATE,  
WASHINGTON, *June 23, 1890.*

SIR: I have had the honor to receive your note of the 20th of April last in relation to the cases of the two Italian subjects Bevivino and Villella, who, having committed murders in the United States of a most aggravated and atrocious character have sought asylum in their own country, which has refused to comply with the demand of this government, based upon treaty, for their extradition. The immediate occasion of your note was the reply made by me to your request for the execution in this country of letters rogatory, issued by a court in Italy, before which the two fugitives have been arraigned for trial, under Italian law, for the crimes committed in the United States. In that reply, I stated that, with a view to preventing, if possible, the total defeat of the ends of justice in the cases in question, I would forward the letter to the Governors of the States of Pennsylvania and New York for such action as they might find it proper to take, the letters being respectively addressed to the authorities in those States. At the same time, I took occasion to reserve what I regarded as the clear right of the Government of the United States under the treaty with Italy to require the delivery of the fugitives for trial in this country.

In answer to this, you remind me that this question has been discussed at length and entirely settled by the Royal Ministry of Foreign Affairs and the United States Legation at Rome; that  
365 Mr. Stallo lately the Minister of the United States to Italy, must have informed this Department that, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, the Judges of his own country; and that, although an exception is made to this principle when a citizen who has committed a crime in a foreign country is there arrested, it nevertheless resumes its force when he returns to his own country. You also state that the new Italian Penal Code expressly forbids the extradition of Italian subjects, and declare that this principle now forms a part of public law, which the United States has recognized in many of its treaties. For these reasons you argue that, 'if the negotiators of the extradition treaty of 1868 had wished to abrogate this universally accepted doctrine, which has been specially adopted by the two contracting parties,' they would certainly 'have stated the fact in a formal declaration, adding to the words of the first article of the said treaty the following clause: 'without excepting their respective citizens.' Under these circumstances, you contend that neither the spirit of Italian law, nor even the text of the treaty, would permit the Italian government to comply with the request for the surrender of Bevivino and Villella.

From this conclusion I should not dissent if I could accept the arguments upon which it is based. I find myself, however, wholly



unable to accept those arguments. In the first place, I may be permitted to observe that we are not discussing a question of Italian law, but an international contract between the United States and

Italy. In this relation, it cannot be regarded as conclusive—  
 366 if, indeed, it is at all pertinent—to quote the Italian municipal law to say nothing of the provisions of the new penal code adopted twenty years after the conclusion of the treaty. If the decision of the question be put upon the municipal law of the contracting parties, this government is entitled to appeal to its own by which no exception is made in favor of its citizens. Viewing the matter merely as a subject of statutory regulation, the surrender by the United States of its citizens is entitled to as much weight as the refusal of Italy to pursue the same course with respect to Italian subjects.

You are correct in your supposition that Mr. Stallo informed the Department of the provisions of Italian law on the subject, but the Department is surprised to learn that the Government of Italy entertains the impression that the question was settled by the Royal Ministry of Foreign Affairs and the United States Legation at Rome. In various interviews with the Royal Ministry of Foreign Affairs reported by him to the Department, as well as in formal communications addressed to that ministry, Mr. Stallo protested against the position of the Italian Government; and the Department is not informed of anything said or written by him that savored of acquiescence. Mr. Stallo's personal views were strongly adverse to the position ultimately taken by the Royal Ministry, and in those views he was supported by the instructions of the Department. The Department is therefore by no means inclined to regard the question as settled. It is thought that it would be a dangerous precedent to admit that a nation may determine its conventional duties by its own  
 statutes. And for this reason, among others, the Government  
 367 of the United States, being clearly of opinion that it is entitled to the extradition of Bevivino and Villella under the treaty of 1868, is unable to relinquish its claim in response to any of the arguments which have been brought against it.

In order to understand the present controversy it is necessary to revert to its origin. It did not arise in the cases of Villella and Bevivino, but in that of Salvatore Paladini, whose extradition Mr. Stallo, on May 17, 1888, demanded of the Italian Government on a charge of passing counterfeit money of the United States, for which Paladini was under indictment in the District Court of the United States for the District of New Jersey. It being important to secure the arrest of the fugitive without delay, Mr. Stallo delivered the requisition to Mr. Crispi in person and called his attention to the urgency of the matter. Mr. Crispi promised to refer it immediately to the Ministry of Grace and Justice and asked no question as to the fugitive's citizenship. Mr. Stallo heard nothing more of the case until the 2nd of June, when he received a letter from the Foreign Office stating that his application had been communicated to the Ministry of grace and justice without the least delay, but that it was important to know of what country Paladini was a native, and what were his paternity and his citizenship. This inquiry was made for



the first time nearly two weeks after the date of the application. On the same day, Mr. Stallo replied that Paladini was a native of Messina, in Sicily, and had never been naturalized as a citizen of the United States, having been in that country only a few months before committing the crime imputed to him. To this note no reply was made; and on June 25, 1888, Mr. Stallo addressed another note to

368 Mr. Crispi, calling attention to the fact that he had not been advised whether the warrant of arrest asked for on the 17th of May had been issued or whether any steps toward Paladini's arrest had been taken. On July 2, Mr. Damiani, the under Secretary of State, replied that the Minister of Grace and Justice had communicated the facts to the Ministry of the Interior, which had taken the steps necessary to the fugitive's apprehension. On July 7, Mr. Damiani wrote again to the effect that the Royal Prefecture in Messina, to which place Paladini had returned, was unable to find him and believed that he had gone back to the United States. Of this note, Mr. Stallo acknowledged the receipt on the 14th of July, and at the same time requested the return of the papers which he had submitted to the Foreign Office 2 months previously in support of his demand for Paladini's surrender. In order, however, that there might be no room for misconstruction of his action, he adverted to the question of citizenship and observed that in his note of May 17, and the documents accompanying it, there was no reference to Paladini's nationality, for the reason that the treaty of 1868 made no distinction between citizens of the contracting parties and other persons. On July 26, Mr. Stallo had an interview with Mr. Crispi, in which the latter took the ground that the treaty did not require the surrender of citizens, and also asserted his impression that there was an express reservation on the subject. Mr. Stallo replied that he was quite fresh from his reading of the treaty and that Mr. Crispi's impression was erroneous. On the following day, Mr. Stallo addressed to Mr. Crispi an elaborate argument, showing that the treaty contained no exception as to citizens, and saying, among other things, that since the middle of the present century, no state had assumed the right to refuse the extradition of its subjects charged with the commission of crime abroad, unless the treaty under which the surrender was demanded contained a clause justifying such refusal.

369 On July 27, the Minister of Foreign Affairs replied, saying, among other things, that the Ministry of Grace and justice, which had been consulted, was of opinion that in the present state of the case the question of citizenship need not further be discussed, for the reason that, according to the rules which governed extradition in Italy, it was necessary to hear in each case, first, the opinion of the crimes section of the court of appeals in the district in which the arrest was asked for (articles 853 and 854 of the code of criminal procedure): second, that of the council of state on the question whether the demand for extradition was conformable to the stipulations of the convention (article 8, No. 2, of the law of March 20, 1865). Paladini not being under arrest, a decision of those tribunals could not be asked. After the receipt of this note, Mr. Stallo learned that Paladini had been arrested at Messina. He at once saw Mr. Crispi,

who said, that in his judgment, it was not necessary at the moment to determine whether an Italian subject could be surrendered, inasmuch as that question would be decided by the court at Messina, before which Paladini would be brought. He added that his interpretation of the treaty of 1868 had been based upon the circumstances that the law of Italy prevented the extradition of Italian subjects for crimes perpetrated in foreign jurisdictions, the crimes committed by them being justiciable by the Italian courts. Mr. Stallo replied that he supposed that in Italy, as elsewhere, treaty obligations were a part of the law of the land, so that in the end they were brought back to the question of Italy's obligation under the treaty. Subsequently, an extended correspondence took place, Mr. Stallo maintaining the duty of surrender, and the foreign office denying it. It is proper to notice that in a note of August 28, transmitted to the foreign office August 30, 1888, Mr. Stallo adverted to the fact that the demand for Paladini's surrender was made on May 17, and that, notwithstanding the evident Italian character of his name, for more than two weeks nothing was said about his nationality. Mr. Stallo also observed that in his note of June 2, he distinctly informed the Minister of Foreign Affairs that Paladini was an Italian subject who had never been naturalized in the United States; but notwithstanding this distinct notice, none of the communications addressed to him by the Italian foreign office thereafter contained a hint that Paladini could not be extradited because he was an Italian subject, and that it was not until the interview of July 26, that this claim was first advanced. From this fact, coupled with the circumstance that all this time and for more than two months, the American agent had waited in Italy to receive Paladini upon his arrest and extradition, as the Italian authorities well knew, the inference would seem to be not only legitimate, but irresistible, that for two months and several days at least, the view taken by the Italian Government of its duty under the treaty of 1868 was the same as that held by the United States.

On August 30, 1888, Mr. Damiani returned the President's warrant to Mr. Casale, the agent of the United States, to the Legation without any comment. On the following day, Mr. Dougherty, Secretary of the Legation, acknowledged its receipt and inquired whether, by the return of the warrant, he was to understand that the Government of His Majesty the King of Italy, refused to extradite Paladini.

On October 25, Mr. Crispi, more than five months after the original demand, announced that, according to the Italian procedure, the minister of grace and justice had submitted the demand to the successive examination of the criminal section of the Court of Appeals of Messina, of the council of State, and of the council of ministers, and that they were unanimously of opinion that Paladini should not be extradited for the reason that he was an Italian subject. This opinion, he said, was based upon certain principles, which he stated. It is unnecessary to recount them, since they are the same, in almost the same language, as those set forth in your note.

In January, 1889, the Department received from Governor Beaver, of Pennsylvania, information that two Italians named Vincenzo

Villella and Guiseppe Bevivino, charged with the commission of atrocious murders in Luzerne County, Pa., had taken refuge in Italy. The Department at once telegraphed information of the facts to the Legation at Rome. Mr. Stallo saw the Minister of Foreign Affairs, and, laying the facts before him, was assured that measures would at once be taken for the arrest of the accused and for their eventual trial in Italy as soon as he could give their names, which he was at the time unable to do, owing to a confusion in the telegrams.

On January 30, 1889, Governor Beaver made a formal request that the extradition of the fugitives be demanded. He had been informed of the attitude of the Italian Government in the case of Paladini, but, because of the importance of inflicting punishment upon the criminals in Pennsylvania, and influenced by an opinion which, he had been informed, had been expressed by the Italian Consul at Philadelphia, to the effect that the fugitives would be given up, he asked the Department to endeavor to obtain their surrender. A president's warrant was accordingly issued to John R. Saville and Frank P. Dimaio, the persons designated by Governor Beaver to receive the fugitives, and Mr. Stallo was so informed. These agents, Mr. Stallo was also informed, would take with them authentic proof of the guilt of the fugitives, and upon arriving in Italy would proceed at once to Rome to consult with him. Meanwhile, he was to ascertain whether the extradition of the fugitives could be obtained, and to apply to the Italian Government for that purpose.

On February 20, Mr. Stallo acknowledged the receipt of the papers, which he transmitted to the foreign office with an application for the fugitives' surrender, coupled with an expression of the earnest desire of the United States that the determination in the Paladini case should be reconsidered. Mr. Stallo also called attention to the fact that the principle witness against the two fugitives was their accomplice, Michele Rizzolo, who was under arrest at Wilkes Barre, in Pennsylvania, and had made a full confession and that it was impracticable to bring this witness, either before or after his trial, to Italy in order to testify before an Italian Court.

On the 7th of March, Mr. Stallo inclosed to the Department a note from Mr. Crispi, bearing date of the preceding day, in which the surrender of the fugitives was refused. The reasons given were the same as those stated in the case of Paladini.

It was in view of the total divergence of opinion between this government and that of His Majesty, developed in the preceding correspondence, that I deemed it necessary to make the reservation contained in my note of the 21st of March last. I shall now endeavor to show that that reservation was not only justified, but also required, by the circumstances.

I do not understand the Italian Government to deny that the provisions of the treaty of 1868, if not obstructed by any municipal statute or qualified by any principle of international law, would oblige the contracting parties to deliver up their citizens. Indeed, I assume this to be admitted. The treaty says that the two governments mutually agree to deliver up "persons who, having been con-

victed of or charged with the crimes specified in the following article committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other." As the term "persons" comprehends citizens, and as the treaty contains no qualification of that term, it is unnecessary to argue that the treaty standing alone would require the extradition by the contracting parties of their citizens or subjects.

I shall also assume it to be admitted by the Italian Government that the parties to a treaty are not permitted to abridge their duty under it by a municipal statute. It is true that the authorities of a country may, by reason of such a statute, find themselves deprived of the power to execute a treaty. But, if, in obeying the statute, they violate or refuse to fulfill the treaty, the other party may  
374 justly complain that its rights are disregarded and may treat the convention as at an end. Hence in appealing to its statutes to justify its action in the present case, I understand the position of the Italian Government to be that those statutes are merely declaratory of the law by which nations are bound to be governed in their dealings one with another.

We are brought, therefore, to the consideration of the question whether the refusal of the Italian Government to deliver up Paladini, Villella and Bevivino, under the treaty of 1868, is justified by the principles of international law. The answer to be given to this question must be decisive of the matter.

It is stated—and the statement has the sanction of the eminent Italian publicist Fiore—that the refusal to surrender citizens had its origin in the practice of extradition by France and the Low Countries in the eighteenth century. Formerly such an exception was not recognized. Even the Romans, who were not wanting in a disposition to assert their imperial prerogatives, did not refuse to deliver up their citizens, their *feciales* being invested, in respect to states in alliance with Rome, with authority to investigate complaints against Roman citizens and to surrender them to justice if the complaints were found to be well grounded. The exception of their citizens by France and the Low Countries originated in the following manner:

The two countries practiced extradition, not under a convention, but under independent declarations of a general character. By the  
375 Brabantine Bull, issued by the German Emperor in the fourteenth century, subjects of the Duke of Brabant enjoyed the privilege of not being withdrawn from his jurisdiction. A similar privilege was gradually extended by law and usage to other subjects of the House of Austria, while the Low Countries were still under its dominion. In consequence of the establishment of this rule, the Low Countries refused to deliver up their subjects, and France, as an act of retaliation, refused to surrender Frenchmen. Thus, not in recognition of any principle, but merely with a view to observe a strict reciprocity, was the precedent first established.

That the example thus set has generally been followed by European states is not to be questioned; for, with the single exception of England, it is believed that they have adopted the rule of refusing

to deliver up their citizens. But in order to determine the force and effect of this rule from the point of view of international law, it is necessary to inquire how it has been secured and enforced. Where no treaty exists, the subject is simple. It is generally agreed that, in the absence of a convention, extradition is a matter of comity, and not of positive obligation. In such case each nation is free to regulate its conduct according to its own discretion. If it decline to surrender its citizens, its action, though detrimental to the interests of justice, does not afford ground for complaint or pressure, since it is acting within its right. But, where the subject is regulated by treaty, the case is different. What before was a matter of comity and discretion, becomes a matter of duty, and the measure of that duty is the treaty. It is not strange, therefore, that, in order to avoid the obligation to extradite their citizens, the states of Europe

376 have industriously inserted in their treaties an express stipulation to exempt themselves from that obligation. With respect to those who are to be surrendered, they usually employ, as is done in the treaty between the United States and Italy, the general term "persons." Having used this term they then proceed to insert a clause to except their citizens from the general obligation; and it is by means of this clause, and not by reason of an implication created by international law, that the duty of surrender is avoided.

More cogent proof of this fact could not be found than is afforded by the extradition treaties of the United States with European nations, to which you refer for the purpose of showing that this government has recognized the exemption of citizens by international law. Among those treaties is that with Prussia and other German states, concluded June 16, 1852, which is the first in which the United States admitted an exception of citizens. It is a part of the public history of extradition that for years the Government of the United States refused to negotiate treaties for the surrender of fugitives from justice with several of the states in Europe, because, owing to the limitations of their domestic laws, they insisted upon the insertion of a clause to exempt their citizens. It was for this reason alone that this government, in order to avoid the misfortune of a total lack of extradition, finally admitted the exception. Accordingly, we find in the preamble to the treaty with Prussia and other German states the following recital:

"Whereas it is found expedient for the better administration of justice and the prevention of crime within the territories and jurisdiction of the parties respectively that persons committing certain heinous crimes, being fugitives from justice, should, under  
377 certain circumstances, be reciprocally delivered up, and also to enumerate such crimes explicitly; and whereas the laws and constitution of Prussia, and of the other German states, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the Government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States: Therefore, etc."

This recital, it is to be observed, was not a declaration by the

United States alone, but by both parties, of the reason for the exclusion of citizens. The same declaration is found in the treaty with Bavaria of 1853, with Austria-Hungary of 1856, with Baden of 1857, and with various German states by virtue of their accession to the treaty, with Prussia, which was, in 1868, finally extended to the whole of the North German Confederation.

In the record of the negotiation of the treaty with Italy no reference is found to the subject of citizens. What may have been said in the oral discussions, cannot now be discovered. It is, however, a matter of record in this department that in the same year, 1868, Mr. Seward, who, as Secretary of State, signed the treaty on the part of the United States, refused to conclude a convention with Belgium because she insisted upon the exception of her citizens. In this relation, I may advert to another fact which possesses great significance. The treaty of extradition concluded between the United States and Italy in 1868 was one of two treaties concluded between

those countries in that year, the other relating to the rights  
378 and privileges of consuls. These treaties were designed to take the place of the treaties formerly made between the United States and the independent states of Sardinia and the Two Sicilies. In the treaty with the latter government, of 1855, there were stipulations relating to extradition, and among them was the following provision:

The citizens and subjects of each of the high contracting parties shall remain exempt from the stipulations of the preceding articles, so far as they relate to the surrender of fugitive criminals. (Article XXIV.)

In view of the existence of this clause in the treaty with the two Sicilies, it can scarcely be supposed that the parties to the substitutionary arrangement of 1868 negotiated that instrument in oblivion of the question as to citizens. And when we consider the omission of the clause, especially in conjunction with Mr. Seward's refusal to negotiate with Belgium, the inference seems to be morally irresistible that the obligation to deliver up their citizens, under the treaty of 1868, was fully understood by the contracting parties at the time of its conclusion.

From what has been stated, I am forced to conclude, not only that international law does not except citizens from surrender, but also that it has been well understood, especially in dealing with the United States, that the term "persons" includes citizens and requires their extradition, unless they are expressly exempted.

Nor am I able to find sufficient ground for the refusal to surrender citizens in the general principles on which extradition is conducted.

It does not satisfy the ends of justice to say that, although a  
379 nation does not extradite its citizens, it undertakes to try and punish them. This argument may be admitted to have great force where, by reason of the absence of any conventional assurance of reciprocity, a nation declines a demand addressed to its discretion. But the chief object of extradition is to secure the punishment of crime at the place where it was committed, in accordance with the law which was then and there of paramount obligation. It



is for this purpose that extradition treaties are made, and, except in so far as their stipulations may prevent the realization of that design, they are to be executed so as to give it full effect. It is at the place where the offence was committed that it can most efficiently and most certainly be prosecuted. It is there that the greatest interest is felt in its punishment, and the moral effect of retribution most needed. There also, the accused has the best opportunity for defense, in being confronted with the witnesses against him; in enjoying the privilege of cross-examining them; and in exercising the right to call his own witnesses to give their testimony in the presence of his judges. These and other weighty considerations, which it is not necessary to state, have led what I am inclined to regard as the great preponderance of authorities on international law at the present day to condemn the exception of citizens from the operation of treaties of extradition. In France, I need only to refer to such well-known writers on extradition as Billot and Bernard. In Italy, I may refer again to the eminent publicist Fiore, who says that, in spite of all that has been said on the subject, his opinion is that,

380 while in former times the absolute prohibition against the surrender of citizens had some reason for its existence, it is insisted upon today rather as one of numerous conventional aphorisms, accepted without searching discussion for fear of showing too little regard for national dignity (*Traite de droit penal int.*, section 362). I will not extend the length of this note by citing other books, but, as showing the general view of eminent publicists, will refer to two resolutions of the Institute of International Law, adopted at the session at Oxford in 1881-'82. Those resolutions are as follows:

VI. Between countries whose criminal legislation rests on like bases, and which should have mutual confidence in their judicial institutions, the extradition of citizens would be a means to assure the good administration of penal justice, since it ought to be regarded as desirable that the jurisdiction of the *forum delicti commissi* should, so far as possible, be called upon to judge.

VII. Admitting it to be the practice to withdraw citizens from extradition, account ought not to be taken of a nationality acquired only after the perpetration of the act for which extradition is demanded. (*Annuaire*, v, 1881-'82, pp. 127, 128.)

At the session at which these resolutions were adopted, seventeen members and eight associates of the institute were present, including some of the most eminent publicists of Europe, and representing Italy, Germany, Austria, Belgium, Spain, France, Great Britain, Greece, Russia and Sweden.

In view of what has been shown, I am unable to discover any ground of reconciliation of the totally opposite views entertained by the United States and Italy in regard to the force and effect of the treaty of 1868, unless the government of Italy will reconsider its position. The present situation, therefore, seems to me to require either the denunciation of that treaty or the conclusion of new stipulations upon which the contracting parties will find themselves in agreement. If, as a part of those stipulations



citizens should be excepted, it would be essential to reach an understanding as to the effect of naturalization. These matters it is not my purpose to discuss on the present occasion, but I deem it my duty to suggest them for consideration.

I accept, etc.

JAMES G. BLAINE.

Foreign Relations 1890, pp. 559-566.

DEFENDANT'S EXHIBIT "C."

*Baron Fava to Mr. Blaine.*

(Translation.)

ROYAL LEGATION OF ITALY,  
WASHINGTON, July 3, 1890.

(Received July 7.)

MR. SECRETARY OF STATE:

I hasten to acknowledge the receipt of the note which you did me the honor to address to me under date of the 23d ultimo, relative to the extradition of Villella and Bevivino. I at once communicated the contents thereof to His Majesty's Government.

Your Excellency will permit me at the same time to rectify an assertion contained in your note, according to which the consul of the King at Philadelphia expressed an opinion in regard to this case which was reported to the governor of Pennsylvania, and which furnished to him an additional argument for endeavoring to induce the Federal Government to secure the extradition of the two persons in question from the Royal Government.

From the very outset, I was scarcely able to believe that the statement contained in Your Excellency's note could be correct, since it seemed hardly possible that a consul of the King could have expressed an opinion concerning a matter that was outside of his competence, as it formed the subject of negotiations between the two Governments. Nevertheless, in view of the importance of the source mentioned, I deemed it my duty to request the consul of

Italy at Philadelphia to furnish an explanation.

383 This explanation is of such a nature, that your Excellency will, I think, have no difficulty in reaching the same conclusion that I have reached, viz., that Governor Beaver has been misinformed. Mr. Serra, who was in charge of the consulate at the time, had no knowledge of the case save what he had gleaned from a conversation with a detective who called at the consulate one day, and after talking of this matter with other persons who were present, asked Mr. Serra his opinion concerning the surrender of Villella and Bevivino. The vice-consul told him in reply, that he had no opinion to express, inasmuch as the question was pending between the two Governments, but that he thought that the abolition of the death penalty in Italy would constitute an almost unsurmountable obstacle to the surrender of these two persons.

Such is the simple fact, which I have desired to make known to Your Excellency with the sole view of establishing the truth, and without wishing to cause the incident to appear more important than it really is.

Be pleased to accept, etc.,

FAVA.

(U. S. For. Rel. 1890, p. 567.)

384

DEFENDANT'S EXHIBIT "D."

Extradition of Delzoppo and Rinaldi.

*Mr. Uhl to Mr. Potter.*

No. 101.

DEPARTMENT OF STATE,  
WASHINGTON, *January 26, 1894.*

SIR: You are instructed to request of the Italian Government in pursuance of existing treaty stipulations, the extradition of Michele Delzoppo and Antonio Rinaldi, under indictment on the charge of murder committed within the State of New York, and who are now in Italy.

The President's warrant to receive fugitives has been issued to Frank J. McNeil, who is authorized to convey them back to the United States for trial. Mr. McNeil is also furnished with duly authenticated copy of the papers in the case.

In this connection, I acknowledge the receipt of your telegram of this date, reading as follows: "Order issued; arrest Delzoppo and Rinaldi."

I am, etc.,

EDWIN F. UHL,  
*Acting Secretary.*

(U. S. For. Relations, 1894, p. 369.)

385

*Mr. MacVeagh to Mr. Gresham.*

EMBASSY OF THE UNITED STATES,  
ROME, *April 10, 1894.*  
(Received April 23.)

(No. 15.)

SIR: On the 3d instant, I sent you the following cablegram:

"Delzoppo and Rinaldi found pursuant your cable January 26 and watched, but arrest impossible without warrant. Agent has never appeared with warrant. Italian Government now asks very prompt action as fugitives intend leaving country.

To this I received next day your reply, as follows:

Will Italian Government surrender Delzoppo and Rinaldi upon proof of guilt?

To my inquiry, dated the 4th instant, I this morning received a note from the minister of foreign affairs stating that the Government of the King could never consent to the extradition of its own sub-

jects, but that the authorities were ready on presentation of the necessary documents to arrest and place on trial here Michele Delzoppo and Antonio Rinaldi.

On receipt of this note, I today cabled you as follows:

Italian Government refuses surrender its subjects but offers on arrival proof of guilt to arrest and try Delzoppo and Rinaldi here.

I am, etc.,

WAYNE MACVEAGH.

(U. S. For. Relations, 1894, p. 370.)

386

(Inclosure 1 in No. 15.)

*Mr. MacVeagh to Baron Blanc.*

EMBASSY OF THE UNITED STATES,

ROME, April 4, 1894.

YOUR EXCELLENCY: On receipt of the note from the ministry for foreign affairs, dated the 2d instant, informing this embassy that Michele Delzoppo and Antonio Rinaldi, two criminals who are wanted in the United States for trial on a charge of murder, were at present under the surveillance of the police, the one at Alexandria and the other at Matrice, I telegraphed my Government as follows:

Delzoppo and Rinaldi found pursuant your cable January 26 and watched, but arrest impossible without warrant. Agent has never appeared with warrant. Italian Government now asks very prompt action, as fugitives intend leaving country.

To the above telegram, I have received the following reply:

Will Italian Government surrender Delzoppo and Rinaldi upon proof of guilt?

I would be obliged if Your Excellency would enable me to make an immediate reply to this telegram.

I avail, etc.,

WAYNE MACVEAGH.

(U. S. For. Relations 1894, p. 370.)

387

(Inclosure 2 in No. 15—Translation.)

*Baron Blanc to Mr. MacVeagh.*

MINISTRY FOR FOREIGN AFFAIRS,

ROME, April 9, 1894.

MR. AMBASSADOR: In reply to the esteemed note of your Excellency of the 4th instant, I have the honor to inform you that the Government of the King, could never consent to the delivery in extradition of two of its subjects. The authorities of the Kingdom are ready, as soon as your excellency furnishes me with the necessary documents, to arrest Michele Delzoppo and Antonio Rinaldi and put them on trial.

Accept, Mr. Ambassador, etc.,

BLANC.

(U. S. For. Relations 1894, pp. 370, 371.)

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Mr. Uhl to Mr. McVeagh.

(No. 18.)

DEPARTMENT OF STATE,  
WASHINGTON, April 24, 1894.

SIR: I have received your dispatch No. 15, of the 10th instant, relative to the extradition of the fugitives Michele Delzoppo and Antonio Rinaldi, with which you transmit a copy of the note of the minister for foreign affairs stating that the Italian Government 'could never consent to the delivery in extradition of its subjects.'

Upon receipt of your telegram of the 10th instant, conveying the same information, the Department communicated it to the governor of New York. No further action will be taken in the case without the request of the authorities of that State. It is deemed proper, however, that you should state to the Italian Minister for foreign affairs that while this Government will not at this time insist upon its rights under the treaty between the two Governments, it, nevertheless, does not waive such rights nor acquiesce in the view taken by the Government of Italy.

I am, etc.,

EDWIN F. UHL,  
*Acting Secretary.*

(U. S. For. Relations, 1894, p. 371.)

389

DEFENDANT'S EXHIBIT "G."

Title Page.

*Condice Penale per il Regno D'Italia.*Torino:  
Fratelli Bocca.Milano, Roma, Firenze.  
1902.

390

Title Page.

*Penal Code for the Kingdom of Italy.*Turin:  
Bocca Brothers.Milan, Rome, Florence.  
1902.

391

*Royal Decree.*Umberto I,  
Per Grazia di Dio e per Volontà Della Nazione, Re D'Italia.

Vista la legge 22 novembre 1888, n. 5801 (serie 3<sup>a</sup>) con la quale il Governo del Re fu autorizzato a pubblicare il codice penale per

il Regno d'Italia, allegate alle legge stezza, introducendo nel testo di esso quelle modificazioni, che, tenuto contro dei voti del Parlamento, revvisasse necessarie, per emendarne le disposizioni e coordinarle tra loro e con quelle degli altri dodici e leggi;

Inteso il Consiglio dei Ministri;

Sulla proposta del Nostro Guardasigilli, Ministro Segretario di Stato per gli affari di Grazia e Giustizia e dei Culti:

Abbiamo decretato a decretiamo:

392

*Royal Decree.*

Humbert I,

By the Grace of God, and the Will of the Nation, King of Italy.

Concerning the law of November 22, 1888, n. 5801, (series 3<sup>a</sup>), under the provisions of which the government of the King was authorized to publish the Penal Code for the Kingdom of Italy, connected with and a part of said law, to embody in its text such modifications thereof, as, in view of the votes of the Parliament, have become necessary for its amendment (correction-emendarne) and coordination between the law itself and the amendments thereof, and with the provisions of the other codes and laws:—

After consultation with the Council of Ministers; upon the proposals of the Custodian of our Seal, Secretary Minister of State for the Affairs of Grace, Justice and Religion (Culti):—

We have decreed and do hereby decree:—

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*Royal Decree—2.*

Art. 1. Il testo definitivo del Codice penale portante la data questo giorno e approvato ed evra esecuzione a cominciare dal lo gennaio 1890.

Art. 2 Un esemplare del suddetto testo definitive del Codice penale, stampato nella Regia tipografia, firmato da Noi e contrassegnato dal Nostro Ministro di Grazia e Giustizia e dei Culti, servira di originale e sara depositato e custodito negli archivi generali del Regno.

Art. 3. La pubblicazione del predetto Codice si eseguirà col trasmetterne un esemplare stampato a ciascuno dei Comuni del Regno per essere depositato nella sala del Consiglio comunale e tenuto ivi esposto durante un mese successive per sei ore in ciascun giorno, affinché ognuno possa prenderne cognizione.

Ordiniamo che il presente decreto, munito del sigillo dello Stato, sia inserito nella raccolta ufficiale delle leggi e dei decreti del.

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*Royal Decree—2.*

Art. I. The definite text of the Penal Code bearing this date is approved and shall be in force and effect on and after the first day of January, 1890.

Art. II. A copy of said definite text of the Penal Code, printed in the Royal Printing Office, subscribed by Us, and countersigned by our Minister of Grace, Justice and Religion, shall serve as the

original and shall be deposited in, and in custody of the general archives of the Kingdom.

Art. III. The publication of said Code shall be effected by transmitting a printed copy thereof to each Community (Municipality—comuni) of the Kingdom for deposit in the Council Hall of the Community (Municipality) and to be held there exposed during one month thereafter for six hours on each day so that every person may take cognizance thereof.

We order that the present Decree, with the seal of State affixed, shall be inscribed in the official collection (raccolta) of the laws and decrees of the

395

*Royal Decree—3.*

Regno d'Italia, mandando e chiunque spetti di osservarlo e di farlo osservare.

Dato a Roma, addi 30 giugno, 1889.

UMBERTO.  
G. ZANARDELLI.

396

*Royal Decree—3.*

Kingdom of Italy, commanding every person concerned to obey (osservando) this decree and to see that it is obeyed (osservare.)

Given at Rome, on the 30th day of June, 1889.

HUMBERT.  
G. ZANARDELLI.

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## First Book.

## LIBRO PRIMO.

*Dei Reati e Delle Pene in Generale.*

## TITOLO I.

*Dell 'Applicazione Della Legge Penale.*

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## 9. Non e ammessa l'estradizione del cittadino.

L'estradizione dello straniero non e ammessa per i delitti politici, ne per i reati che a questi siano connessi.

L'estradizione dello straniero non puo essere offerto ne consentita se non dal governo del Re, a previa deliberazione conforme dell'autorita giudiziaria del luogo in cui lo straniero si trovi.

Nondimeno, su domanda of offerta di estradizione puo essere ordinate l'arresto provvisorio dello straniero.

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## FIRST BOOK.

*Concerning Crimes and Penalties in General.*

## TITLE I.

*Of the Application of the Penal Law.*

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9. The extradition of a citizen is not permitted (conceda-ammessa).

The extradition of an alien is not permitted (conceda-ammessa) for political offenses, not for crimes connected with political offenses.

The extradition of an alien can neither be offered nor granted except by the government of the King, and after previous deliberation in conformity, with the judicial authority of the place in which the alien is found.

However, upon demand or offer of extradition, the provisional arrest of an alien may be ordered.

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399 In the Court of Oyer and Terminer and Quarter Sessions of the Peace in and for the County of Hudson and State of New Jersey.

In the Matter of the Extradition of PORTER CHARLTON.

STATE

v.

PORTER CHARLTON.

UNITED STATES OF AMERICA,  
*District of Columbia, ss:*

Comes now Oscar George Theodore Sonneck, who signs his name Oscar G. T. Sonneck, and, being first duly sworn, says:

I am of full age, and employed in the Library of the Congress of the United States, in the City of Washington, District of Columbia, United States of America, where I reside; I am familiar with the Italian language, both by study, and by residence in Italy; the attached translation into English, of the Italian text opposite to each page thereof, has been made by me, and after transcription into type-writing has been compared, and approved by me as a true and correct translation of such portions of the Italian Penal Code, submitted to me, as are germane to the subject of Extradition thereunder, and of all portions of said Code germane to said subject.

(S'g'd)

OSCAR G. T. SONNECK.

Subscribed in my presence and sworn to before me this 3d day of October, 1910, at the City of Washington, in the District of



Columbia, as witness my hand and notarial seal as of said date.

400 (S'g'd) MARTIN A. ROBERTS,  
*Notary Public in and for the District of Columbia.*

My Commission expires November 12, 1912.

401 THE UNITED STATES OF AMERICA,  
*State of New Jersey, County of Hudson:*

In the Matter of the Extradition of PORTER CHARLTON.

I, John A. Blair, one of the Judges of the Court of Oyer and Terminer, in and for the County of Hudson, State of New Jersey, being duly authorized by law to issue the warrant for the arrest of Porter Charlton, and to hear evidence in respect to the charge against Porter Charlton, and proceed, according to law, in the matter of the extradition of Porter Charlton, a fugitive from justice, from the Kingdom of Italy, a foreign government, under a Treaty existing between the United States and said Kingdom of Italy, do hereby certify that a complaint was duly made on oath and in writing, before me, by Gustavo Di Rosa, Vice Consul for the Kingdom of Italy, in the United States of America, charging Porter Charlton with having committed the crime of murder within the jurisdiction of the government of Italy; and that, the said Porter Charlton being a fugitive from the justice of said country, I thereupon issued my warrant for the arrest of the said Porter Charlton, directed to the Sheriff of the County of Hudson, State of New Jersey, and by virtue thereof, the said Porter Charlton was, by the said Sheriff, arrested and brought before me for examination and hearing upon said charge; and that said examination and hearing was held on the twenty-eighth day of June, A. D., 1910, and postponed at the request of the said Porter Charlton, until the eighth day of July, A. D., 1910, and again postponed, at  
402 the request of the said Porter Charlton, until the eleventh day of August, A. D., 1910, and again at the request of the said Porter Charlton a further postponement was granted until the twenty-first day of September, A. D., 1910; and that on that day, at the Court House, in the City of Jersey City, County of Hudson, State of New Jersey, William D. Edwards, Edwin F. Smith and Floyd Clarke, appearing as Counsel for the prisoner and Pierre P. Garven as Counsel for the Italian Government, evidence was adduced before me which I consider sufficient evidence to sustain the charge, under the law and provisions of the Treaty of Extradition between the government of the United States and the government of Italy; and that I have, accordingly, by my warrant, under my hand and official seal, on the fourteenth day of October, A. D. 1910, committed him, the said Porter Charlton, to the Hudson County Jail, in the City of Jersey City, there to be safely kept until he shall be surrendered to the Kingdom of Italy under warrant from the Government of the United States, or until he be thence discharged by due process of law.

I further certify that the following is a true copy of the testimony taken before me on said hearing and examination.

Witness my hand and seal this second day of November, A. D., One Thousand Nine Hundred and Ten.

[SEAL.]

(Signed)

JOHN A. BLAIR,

*One of the Judges of the Court of Common Pleas in and for the County of Hudson and, in the Absence of a Justice of the Supreme Court, Sitting in and Holding said Court of Oyer and Terminer.*

403 (Endorsed:) United States Circuit Court, District of New Jersey. In the matter of the application of Porter Charlton for a Writ of Habeas Corpus and a writ of certiorari in the pending proceeding, entitled "In the matter of the application for the extradition of Porter Charlton under the Treaty between the United States and Italy." Writ of Certiorari. Due service of — is hereby admitted — day of —, 19—. Attorney for — —, R. Floyd Clarke, Attorney for — —, 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Let the within writ issue. Dated 10 day of December, 1910. John Rellstab.

404 The President of the United States to Hon. John A. Blair, a judge of the Court of Oyer & Terminer of Hudson County, New Jersey, sitting as a Committing Magistrate and acting therein under authority conferred upon him by Act of Congress of 1848, concerning the extradition of fugitives from a foreign government under a treaty or convention between this and any foreign government, and the acts amending and supplementing the same, in the proceeding entitled "Hudson County Court of Oyer & Terminer, in the matter of the application for the extradition of Porter Charlton under the treaty between the United States of America and the Kingdom of Italy," and the Hon. P. C. Knox, Secretary of State of the United States of America, Greeting:

We command you that you return before a stated term of the Circuit Court of the United States for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer and State of New Jersey, on the 19th day of December, 1910, at 10.30 o'clock in the fore-noon of that day, a true transcript of all proceedings had and taken before the said Magistrates against Porter Charlton under and pursuant to a warrant issued by said Magistrate on the 24th day of June, 1910, upon a complaint purporting to have been made by Gustavo di Rosa, Vice Consul of the Kingdom of Italy in the United States of America for the jurisdiction of the State of New Jersey, and under and pursuant to a certain further warrant dated October 15, 1910, issued by said Magistrate for the commitment of said

405 Porter Charlton, so charged, to the County jail of Hudson County in the custody of James J. Kelly, Sheriff of Hudson County in Jersey City, there to remain until the surrender of the

said prisoner should be made pursuant to the Act of Congress in such case made and provided, and also all proceedings taken before said Magistrate in said matter, and to do and receive what shall then and there be considered concerning the said matters, and have you then and there this writ.

Witness the Hon. John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 10th day of December, One Thousand nine hundred and ten.

[L. S.]

H. D. OLIPHANT, *Clerk.*

R. Floyd Clarke, Attorney for Petitioner. Office and Post Office Address, 37 Wall Street, Borough of Manhattan, New York City.

A true copy.

[SEAL.] H. D. OLIPHANT, *Clerk.*

406 In obedience to the command of the foregoing writ of Certiorari, I do hereby return to the term of the Circuit Court of the United States for the District of New Jersey, to be held at the New Jersey State Capitol Building in the City of Trenton, County of Mercer, State of New Jersey, on the 19th day of December, 1910, at ten o'clock A. M., a true transcript of all proceedings had before me as Judge of the Court of Oyer & Terminer of Hudson County, New Jersey, sitting as Committing Magistrate and acting under authority conferred upon me by Act of Congress of 1848, concerning the extradition of fugitives from a foreign government, under a treaty or convention between this and any foreign government; and the Acts amending and supplementing the same, in the proceeding entitled Hudson County Court of Oyer & Terminer, in the matter of the application for the extradition of Porter Charlton, under treaty between the United States and the Kingdom of Italy, and pursuant to a warrant issued by me as said Magistrate, on the 24th day of June, 1910, upon complaint purporting to have been made by Gustav di Rosa, Vice Consul of the Kingdom of Italy to the United States of America, for the jurisdiction of the State of New Jersey; and pursuant also to a certain further warrant, dated October 15, 1910, issued by me as said Magistrate for the Commitment of said Porter Charlton to the County Jail of Hudson County, in the custody of James J. Kelly, Sheriff of Hudson County, in New Jersey, there to remain until the surrender of the said prisoner should be made pursuant to the Act of Congress in such case made and provided. This return contains all papers and evidence produced before me in this proceeding, except the Docier, which was forwarded to and is now in the possession of the Secretary of State of the United States, in Washington D. C.

JOHN A. BLAIR, *Judge.*

407 #6082. Before Honorable John A. Blair, Oyer & Terminer Court, Hudson County, New Jersey. State vs. Porter Charlton. Transcript of Proceedings on hearing of Application for Extradition, June 28th, July 8th, August 11th and on September 21st, 1910, and Exhibits. Filed December 19, 1910. H. D. Oliphant, *Clerk.*

408 United States Circuit Court, District of New Jersey.

In the Matter of the Application of PORTER CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

*Order Remanding Petitioner to Custody of Sheriff of Hudson County.*

It is on this Nineteenth day of December, Nineteen hundred and ten,

Ordered That the petitioner Porter Charlton, be remanded to the custody of the Sheriff of Hudson County New Jersey, pending the entry of judgment upon the writ of habeas corpus issued herein.

JOHN RELLSTAB, *Judge.*

409 17-105. 6082. United States Circuit Court, District of New Jersey. In the matter of the application of Porter Charlton for a writ of Habeas Corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the Application for the extradition of Porter Charlton under the treaty between the United States and Italy." Order Remanding Petitioner to Custody of Sheriff of Hudson County. Filed December 19th, 1910. H. D. Oliphant, Clerk.

410 United States Circuit Court for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

UNITED STATES OF AMERICA,  
*State of New York, Southern*  
*District of New York, ss:*

R. Floyd Clarke, being duly sworn, deposes and says:

1. I am the attorney for the petitioner herein.
2. As counsel for the petitioner and the prisoner I was present before the Hon. Judge Blair in the above entitled matter on the hearing and trial of said matter on the 21st day of September, 1910, which was the date of the actual hearing in said matter, the other dates being mere adjournments.
3. At the hearing before the said Hon. John A. Blair there was no offer of introduction in evidence in this proceeding of the following documents, which were returned on the return of James J. Kelly, Sheriff of Hudson County, in answer to the writ of habeas corpus herein, namely:

The alleged commitment on a charge of murder for further examination in the Recorder's Court in the city of Hoboken, dated June 24, 1910, and signed by the Hon. John J. McGovern, Recorder;

And your deponent and petitioner requests a diminution of the record in the above respects.

4. Deponent and petitioner further allege that all that part of the return of the said James J. Kelly, sheriff as aforesaid, being the alleged copy of the complaint filed in the Court of Oyer and Terminer by the Hon. Gustavo Di Rosa, Vice-Consul of the Kingdom of Italy, on June 24, 1910, is not and should not be a part of said return, in that it forms no part of the proceedings herein, except in so far as it is contained in the record of the hearing before the Hon. Judge Blair, returned on the writ of certiorari herein, not as proof of the facts stated in said affidavit, but as proof of the making of such a complaint in compliance with the provisions of the treaty, and that the said return of said Sheriff is improper and prejudicial to petitioner in setting forth said extrinsic matter. And deponent and petitioner allege and request a diminution of said *said* return in said respect.

5. Deponent and petitioner further allege that on the hearing of this matter before the said Hon. John A. Blair no formal demand for the extradition of said Porter Charlton from the Italian government to the American government was offered or received in evidence, and deponent and petitioner allege that a certain document purporting to be a communication from Italy to the United States government and alleged to bear date July 28, 1910, which has been transmitted by the Hon. the Secretary of State to the Clerk of this Court under separate cover and address from the cover and address in which there was returned to this Court the return of the said Hon. Secretary of State of the writ of certiorari herein, forms no part of the return on said certiorari and is no part of the record herein, although deponent admits, as stated in the letter of the Hon. Secretary of State to the Clerk of this Court accompanying said document, that deponent requested the said document to be forwarded to this Court; and deponent objects to the consideration of said document as a part of the record herein, on the foregoing grounds, and on the further ground that said alleged copy of said alleged communication from Italy to the United States, alleged to bear date the 28th day of July, 1910, bears no record or mark as to the date of the presenting or filing thereof in the *in the* office of the Secretary of State, and that the date of said presenting and filing is vital in this case, since any such document under the provisions of the treaty must be filed within forty days from the date of the imprisonment, namely, June 24, 1910, and the alleged date of said letter is not proof or evidence of the filing in the office of the Secretary of State at that or at any other date; also that the certificate of the Hon. Secretary of State transmitting said alleged communication simply certifies that the same are true copies from the files of the department, and is dated December 17, 1910, and contains no certificate or evidence or proofs as to the date

of the presenting or filing of said alleged communication in said office, which date is vital in this case.

413 Deponent and petitioner further allege that, as appears from said papers transmitted by the Hon. Secretary of State, the said alleged communication is not made a part of the return to the said writ of certiorari, and is not competent to be considered by this Court, not only by reason of the foregoing fact, but also by reason of the fact that the same was not a part of the record in the Magistrate's Court below, nor called for in the writ of certiorari, and is entirely immaterial and irrelevant.

Deponent and petitioner further allege as follows, namely: That, as deponent believes, correspondence has occurred between the Government of Italy and the United States of America, with reference to the extradition of Porter Charlton which is important to be considered by the Court in connection with the performance by Italy of the requirements of the Treaty in requisitioning for the extradition of Porter Charlton, and that, without prejudice to my opposition to any further writ of certiorari, if any facts taken from said record are to be considered, it is proper that the entire record should be brought before this Court in order that this Court may determine whether the provisions of said treaty have been duly complied with by Italy as a condition precedent to the granting of said extradition. And deponent also avers that correspondence has occurred between the deponent and the State Department, and deponent is informed and believes that the interests of the petitioner require that said correspondence should be included in the requirement of said writ of certiorari.

R. FLOYD CLARKE.

Subscribed and sworn to before me this 24th day of December, 1910.

[L. S.]

EMILE RIESER,

*Notary Public, Kings County, N. Y.*

Certificate filed in New York County.

414 17-105. 6082. U. S. Circuit Court, for the District of New Jersey. In the Matter of the application of Porter Charlton for a Writ of Habeas Corpus and a Writ of Certiorari, etc. Affidavit on Motion of Petitioner. R. Floyd Clarke, Attorney for Petitioner, 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Filed December 27, 1910. H. D. Oliphant, Clerk.

415 United States Circuit Court for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

To the Circuit Court of the United States:

The petition of Giacomo Fara Forin respectfully shows that he is



Consul General for the Italian Government, having jurisdiction in the State of New Jersey; that the above mentioned Porter Charlton is now confined in the Hudson County Jail charged with the murder of his wife, in Italy, on or about June 7th, last; that the Italian Government through its Vice Consul made complaint under Section 5270 of the United States Revised Statutes, before the Honorable John A. Blair, one of the Judges of the Hudson County Court of Oyer and Terminer, who issued his warrant for the apprehension of the said Charlton, and upon the hearing in said case, heard evidence upon which the said Judge committed Charlton to the custody of the Sheriff of Hudson County until he shall be surrendered to the Kingdom of Italy or until he be discharged by the course of law; that at the hearing, as appears in the return filed in this Court, by the Honorable John A. Blair, a motion was made to dismiss the above mentioned proceedings instituted against the said Charlton, on the ground that no formal demand by the Italian

416 Government, for the extradition of the said Charlton was filed, made, entered or received by the United States Government, executive or judicial, within the forty days required by the Treaty of 1884; that on page 8 of the petition to this Court for the writ of habeas corpus aforesaid, the petitioner alleges: "Fifth. that no documents were presented either to the Department of State of the United States, or to the Court of Oyer and Terminer of Hudson County, New Jersey, sitting, under the provision of the Act of Congress in that behalf made and provided, as a federal examining magistrate in said extradition matter, as aforesaid, within forty days as provided in said extradition convention and the additions thereto; and said documents when presented on August 11th, 1910, more than forty days after the arrest of the said Porter Charlton as aforesaid, were neither accompanied by the formal demand of the Government of Italy for the extradition of Porter Charlton, nor were the documents so presented, authenticated identified and offered in the manner provided by said Convention and additions thereto, and the statutes in such cases made and provided"; and again on page 11 of said petition it is alleged that at the hearing before the Secretary of State, no evidence was presented of any jurisdictional facts, warranting the imprisonment and detention of the said Charlton; that a formal demand is not a part of the record now before this Court, but your petitioner verily believes such demand was made by the Italian Government to the Secretary of State of the United States on or about July thirtieth, last, for the extradition of said Charlton; and that the aforesaid demand is a material and relevant part of the record in this proceeding.

417 Whereupon your petitioner prays that a writ of certiorari issue, directed to the Honorable Philander C. Knox, Secretary of State of the United States of America, commanding him to certify and return before this Honorable Court the formal demand for the extradition of the said Porter Charlton, made by the representative of the Italian Government to the said Secretary of State, on or about July thirtieth, last, together with a transcript of the



record showing date when said demand was filed, for such action thereon as may be proper in the premises.

Dated 19th day of December, A. D. 1910.

PIERRE P. GARVEN,  
*Attorney for Petitioner.*

Office and Post Office Address 586 Newark Avenue, Jersey City, N. J.

UNITED STATES OF AMERICA,  
*City of New York, County of New York, ss:*

Giacomo Fara Forni, being duly sworn according to law, on his oath deposes and says that he has read the foregoing petition and knows the contents thereof; and that the same is in all respects true to the best of his knowledge and belief.

G. FARA FORNI.

Subscribed and sworn to before me this 21st day of December, A. D. 1910.

JAMES W. McCARTHY,  
*Master in Chancery of New Jersey.*

418 17-105. 6082. United States Circuit Court for the District of New Jersey. In the matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari, in the pending proceeding, entitled "In the matter of the application for the extradition of Porter Charlton under the Treaty between the United States and Italy." Petition. Pierre P. Garven, Attorney for Petitioner, Office and Post Office address 586 Newark Ave., Jersey City, N. J. Filed December 28, 1910. H. D. Oliphant, Clerk.

419 At a Stated Term of the United States Circuit Court for the District of New Jersey, in the Third Circuit, Held at the United States Court Room, in the Capitol Building, in the City of Trenton, on the 30th Day of December, in the Year 1910.

Present: The Hon. John Rellstab, J.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding, Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

The above matter having come on to be heard on the petition for and the return to writs of habeas corpus and certiorari, and on the motion of R. Floyd Clarke, Esq., as counsel for the petitioner, and on his affidavit verified the 24th day of December, 1910, requesting diminution of the return on the writ of habeas corpus heretofore issued herein to the Sheriff of Hudson County, it is

Ordered, that the said return of the said James J. Kelly Sheriff of the County of Hudson to the writ of habeas corpus herein,  
420 be diminished by the striking therefrom of the following matters, namely:—

1. The alleged commitment, on a charge of murder, of Porter Charlton, for further examination in the Recorder's Court of the city of Hoboken, dated June 24, 1910, and signed by John J. McGovern, Recorder.

2. The alleged copy of the complaint taken by said Recorder John J. McGovern and filed in the Court of Oyer and Terminer by the Hon. Gustave Di Rosa, Vice-Consul of the Kingdom of Italy, on June 24, 1910, now attached to said return.

And on the motion of R. Floyd Clarke, Esq., of counsel for the petitioner herein, supported by his affidavit herein bearing date the 24th day of December, 1910, it is hereby

Ordered, That a certain document or communication purporting to be from the Italian Government to the American Government, (Alleged to bear date July 28, 1910), transmitted under separate cover and address to the Clerk of this Court by the Hon. Secretary of State, is no part of the record on the return to the writ of certiorari heretofore granted herein, directed to said the Hon. Secretary of State, and is not to be considered as a part of said return to said writ.

And Pierre Garvan, Esq., of counsel for the Hon. Gustave Di Rosa, Vice-Consul of the Kingdom of Italy for the city of New York, having moved this Court by his petition verified the 19th day of December for a further writ of certiorari directed to the Hon. the Secretary of State of the United States of America, requiring him to certify as set forth in said writ, the following matters;

among others, namely: A true copy of the demand of the  
421 Kingdom of Italy upon the United States Government for the extradition of Porter Charlton dated on or about July 30th last and the date of the filing of the same in the office of the Secretary of State;

Now, on reading and filing the affidavit of R. Floyd Clark, Esq., verified the 24th day of December, 1910, and after hearing Pierre Garvan, Esq., in support of said application for said further writ of certiorari, and R. Floyd Clarke Esq., of counsel for the petitioner, in opposition thereto, on the ground among others that the only matter properly before this Court on the writs of habeas corpus and certiorari herein is the record of the proceedings before the Magistrate herein; it is

Ordered, that the said further writ of certiorari issue as requested by the said Pierre Garvan, counsel for the respondent;

And it is further

Ordered, that the motion thereupon made by R. Floyd Clarke, of counsel for the petitioner, to the effect that if against his opposition thereto a further writ of certiorari is granted and directed to the Secretary of State requiring any further return from him as to the facts herein, thereupon and in any such event, without preju-

dice to his said opposition to the granting of said writ, the said writ be extended to requiring the said Hon. Secretary of State to furnish the following documents and facts namely:

1. The correspondence between the Italian Government and the American Government in regard to the extradition of Porter Charlton.

2. The original requisition for his surrender as a fugitive from justice, together with the accompanying documents, if any, or a certificate that no such documents accompanied the same.

422 3. The formal demand for the extradition of said Porter Charlton, if any;

4. And a proper certificate certifying the same and certifying the exact date when each of said documents, copies of which are so certified, were respectively filed in the office of the Secretary of State.

5. The correspondence between the Hon. the Secretary of State and R. Floyd Clarke, counsel for the petitioner and prisoner, between and including the 28th day of July, 1910, and the 22d day of September, 1910,—

Be and the same hereby is denied. And it is further

Ordered, that the hearing on the said writs of habeas corpus and certiorari pending the return on the matters above referred to, be and the same hereby is, on motion and consent of the counsel for the petitioner and consent of the respondent, adjourned to the 9th day of January, 1911 at 10.30 o'clock in the forenoon of that day, at the United States Court Room in the Capitol Building in said city. And it is further

Ordered, that pending such adjournment the prisoner be remanded to the custody of James J. Kelly, Sheriff of Hudson County, State of New Jersey.

JOHN RELLSTAB, *Judge.*

We consent to the form of the foregoing order.

R. FLOYD CLARKE,

*Att'y for Charlton.*

PIERRE P. GARVAN,

*Att'y for Italian Government.*

Dec. 26, 1910.

423 17-105. 6082. United States Circuit Court for the District of New Jersey. In the Matter of the Application of Porter Charlton for a Writ of Habeas Corpus and a Writ of Certiorari, etc. Order on Motions Against Returns to Writs. R. Floyd Clarke, Att'y for Petitioner, No. 37 Wall Street, Borough of Manhattan City of New York N. Y. Filed December 30, 1910. H. D. Oliphant, Clerk.

424 At a Stated Term of the United States Circuit Court for the District of New Jersey, in the Third Circuit, Held at the United States Court Room, in the Capitol Building, in the City of Trenton, on the 4th Day of January, 1911.

Present: The Hon. John Rellstab, J.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding, Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

The above matter having come on to be heard as stated in the order entered herein and bearing date the 30th day of December in the year 1910, and the application of R. Floyd Clarke, of counsel for the petitioner, without prejudice to his contentions as therein stated for a further writ of certiorari to issue in connection with the writ of certiorari obtained and granted thereunder on behalf of Pierre Garvan, as counsel for the respondent, having been denied;

Now, on motion of R. Floyd Clarke, Esq., of counsel for the petitioner, and on his affidavit verified the 24th day of December, 1910, heretofore *used* and filed herein in connection with the said order entered herein on the 30th day of December, 1910, it is

Ordered, That the State Department be requested to furnish for the information of the Court the following facts and documents, if in its discretion the State Department shall not deem it prejudicial to the public interests so to do, namely:—

1. The correspondence between the Italian Government and the American Government in regard to the extradition of Porter Charlton.

2. The original requisition for his surrender as a fugitive from justice, together with the accompanying documents, if any, or a certificate that no such documents accompanied the same.

3. The formal demand for the extradition of Porter Charlton, if any.

4. A proper certificate certifying the same and certifying the exact date when each of said documents, copies of which are so certified, were respectively filed in the office of the Secretary of State.

5. The correspondence between the Honorable Secretary of State and R. Floyd Clarke, counsel for the petitioner and prisoner, between and including the 28th day of July, 1910 and the 23d day of September, 1910.

JOHN RELLSTAB, *Judge.*

426 17-105. 6082. United States Circuit Court District of New Jersey. In the matter of the Application of Paul Charlton for a Writ of Habeas Corpus and a Writ of Certiorari, etc. Order Requesting Secretary of State to furnish facts and documents if not prejudicial to public interests. R. Floyd Clarke, Atty. for Petitioner, No. 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Filed January 4, 1911. H. D. Oliphant, Clerk.

427

DEPARTMENT OF STATE,  
WASHINGTON, *January 3, 1911.*

The Clerk of the United States Circuit Court for the District of New Jersey, Trenton, New Jersey.

SIR: Referring to the writ of certiorari which commands the return, before the term of the Circuit Court of the United States for the District of New Jersey to be held on the 5th instant, of the formal demand for the extradition of Porter Charlton made by Italian Ambassador, I enclose herewith certified copies of the Ambassador's formal request and of the English translation thereof.

While, under the authorities, the Executive is not in such matters subject to control by the processes of the courts, the Department desires to comply with the wishes of the Court. The duty imposed upon the Secretary of State as custodian of the archives and records of the Department does not, however, permit of the removal of original documents from the archives. The certified copies herewith transmitted are made of equal validity with the originals by Section 882 of the Revised Statutes of the United States which provides that,

"Copies of any books, records, papers or documents in any of the Executive Departments, authenticated under the seals of such Departments respectively, shall be admitted in evidence equally with the originals thereof."

The date of the receipt at the Department of the Italian Ambassador's formal request is shown on the certified copy of the original request.

The writ of certiorari is herewith returned.

I am, Sir,

Your obedient servant,

P. C. KNOX.

Enclosures: Copy and translation of note from the Italian Ambassador. Writ of certiorari. 211,65C. ☐ 7. S/C. SGS. F. V.

*Copy of Envelope.*

Department of State, U. S. A.  
Official Business.

Penalty for  
Private Use, \$300.

Washington, D. C.  
Jan. 3,  
6 P. M.,  
1911.

THE CLERK OF THE UNITED STATES CIRCUIT  
COURT FOR THE DISTRICT OF NEW JERSEY,  
Trenton,  
New Jersey.

429

No. 5718.

UNITED STATES OF AMERICA,

*Department of State:*

To All to Whom These Presents Shall Come, Greeting:

I certify that the document hereto annexed is a true copy from the files and records of this Department.\*

In Testimony Whereof, I, P. C. KNOX Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citizenship of the said Department, at the City of Washington, this 3rd day of January, 1911.

[SEAL.]

P. C. KNOX,

*Secretary of State,*

By R. W. FLOURNOY, JR.,  
*Chief Bureau of Citizenship.*

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Index Bureau,

N. Jul. —, 1:30, 1910. E.  
Depart. of State.

No. 1229.

Regia Ambasciata D'Italia, Washington, D. C.,

MANCHESTER, MASS., 28 luglio, 1910.

SIGNOR SEGRETARIO DI STATO: Con riferimento a precedenti comunicazioni e conformemente al disposto dell'articolo V della Convenzione di Estradizione del 23 marzo 1868, ho l'onore di presentare a Vostra Eccellenza formale domanda per l'estradizione del nominato Porter Charlton, reo confesso del delitto di omicidio commesso sulla persona della propria moglie a Moltrasio (Como), delitto contemplato allo articolo II, alinea I, della predetta Convenzione.

Per l'arresto provvisorio del su menzionato imputato Vostra Eccellenza ha già, avuto la cortesia di farmi tenere, con Sua nota del 28 giugno scorso, No. 864, il certificato preliminare d'arresto contemplato dall'articolo II della Convenzione Addizionale dell'11 Giugno 1884.

A conferma di questa domanda ho l'onore di trasmettere qui unito a Vostra Eccellenza gli atti dell'istruttoria compiuta dal Tribunale di Como a riguardo del predetto omicidio. Tali documenti sono stati regolarmente visti dalla Ambasciata degli Stati Uniti in Roma.

In attesa del relativo "warrant" Federale e della cortese restituzione di questi documenti per essere presentati al Tribunale competente, colgo l'incontro per rinnovar Le, Signor Segretario di Stato,

\* For the contents of the annexed Document the Department assumes no responsibility.

insieme ai miei anticipati ringraziamenti, gli atti della mia piu' alta considerazione.

MONTAGLIARI.

A Sua Eccellenza, L'On. P. C. Knox, Segretario di Stato, Washington.

431

Translation.

No. 1229.

ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., *July 28, 1910.*

MR. SECRETARY OF STATE: Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before Your Excellency a formal request for the extradition of Porter Charlton who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II, Section I of the said Convention.

Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

In support of this request I have the honor to transmit herewith to Your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly visaed by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return of the enclosed papers for submission to the competent court, I avail myself of this opportunity to renew to Your Excellency, together with my thanks in advance, the assurance of my highest consideration.

MONTAGLIARI.

432

—ment of State,

— 3, 1911

F to 7

Division of

Eastern Affairs.

—eived Jan. 3, 1911.

Diplomatic Bureau.

UNITED STATES OF AMERICA:

The President of the United States to the Honorable Philander C. Knox, Secretary of State of the United States of America, Greeting:

We command you that you return before a stated term of the Circuit Court of the United States, for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer, State of New Jersey, on the fifth day of January, A. D. one thousand nine hundred and eleven, at ten thirty



o'clock in the forenoon of that day, the formal demand for the extradition of Porter Charlton, made by the representative of the Italian Government to the Secretary of State, on or about July thirtieth, A. D. one thousand nine hundred and ten, together with a transcript of the record, showing date when said demand was filed, and to do and receive what shall then and there be considered concerning the said matters, and have you then and there this writ.

Witness: The Honorable Edward D. White, Chief Justice of the Supreme Court, of the United States, the Twenty-eighth, day of December, A. D. 1910.

[L. s.]

H. D. OLIPHANT, *Clerk*.

[L. s.] A true copy.

H. D. OLIPHANT, *Clerk*.

433 United States Circuit Court for the District of New Jersey.

In the matter of the application of Paul Charlton, for a writ of habeas corpus and a writ of certiorari, in the pending proceeding, entitled "In the Matter of the application for the extradition of Porter Charlton, under the Treaty Between the United States and Italy. Chief Clerk, Dep't of State. Dec. 30, 1910. Writ of Certiorari Allocatur John Rellstab, Judge. Pierre P. Garven, Att'y for Petitioner. Office and Post Office address, 586 Newark Avenue, Jersey City. Filed January 4, 1911. H. D. Oliphant, Clerk.

434 At a Stated Term of the United States Circuit Court for the District of New Jersey, in the Third Circuit, Held at the United States Court Room, in the Capitol Building, in the City of Trenton, on the 4th day of January, 1911.

Present: The Hon. John Rellstab, J.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

The above matter having come on to be heard as stated in the order entered herein and bearing date the 30th day of December in the year 1910, and the application of R. Floyd Clarke, of counsel for the petitioner, without prejudice to his contentions as therein stated for a further writ of certiorari to issue in connection with the writ of certiorari obtained and granted thereunder on behalf of Pierre Garven, as counsel for the respondent, having been denied;

Now, on motion of R. Floyd Clarke, Esq. of counsel for the petitioner, and on his affidavit verified the 24th day of December, 1910, heretofore used and filed herein in connection with the said order entered herein on the 30th day of December, 1910, it is

Ordered, That the State Department be requested to furnish for the information of the Court the following facts and documents if in its

discretion the State Department shall not deem it prejudicial to the public interests so do, namely:

1. The correspondence between the Italian Government and the American Government in regard to the extradition of Porter Charlton.

2. The original requisition for his surrender as a fugitive from Justice, together with the accompanying documents, if any, or a certificate that no such documents accompanied the same.

3. The formal demand for the extradition of Porter Charlton, if any.

4. A proper certificate certifying the same and certifying the exact date when each of said documents, copies of which are so certified, were respectively filed in the office of the Secretary of State.

5. The correspondence between the Honorable Secretary of State and R. Floyd Clarke, counsel for the petitioner and prisoner, between and including the 28th day of July 1910 and the 23d day of September, 1910.

(Signed)

JOHN RELLSTAB, *Judge*.

436 17-105. 6082. 31180. United States Circuit Court, District of New Jersey. In the matter of the Application of Paul Charlton for a Writ of Habeas Corpus and a Writ of Certiorari, etc. Copy. Order Requesting Secretary of State to Furnish Facts and Documents if not prejudicial to public interests and return of service. Filed Jan. 4, 1911. R. Floyd Clarke, Attorney for Petitioner, No. 37 Wall Street, Borough of Manhattan, City of New York, N. Y. Filed January 9, 1911, H. D. Oliphant, Clerk. Served certified copy of within order on Hon. P. C. Knox, Secretary of State, personally Jan. 6, 1911. Aulick Palmer, U. S. Marshal D. C.

437 UNITED STATES OF AMERICA:

The President of the United States to the Honorable Philander C. Knox, Secretary of State of the United States of America, Greeting:

We command you that you return before a stated term of the Circuit Court of the United States, for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer, State of New Jersey, on the fifth day of January, A. D. one thousand nine hundred and eleven, at ten thirty o'clock in the forenoon of that day, the formal demand for the extradition of Porter Charlton, made by the representative of the Italian Government to the Secretary of State, on or about July thirtieth, A. D. one thousand nine hundred and ten, together with a transcript of the record, showing date when said demand was filed, and to do and receive what shall then and there be considered concerning the said matters, and have you then and there this writ.

Witness: The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the Twenty-eighth day of December, A. D. 1910.

[L. s.]

H. D. OLIPHANT, *Clerk*.

438 17-105. 6082. United States Circuit Court for the District of New Jersey. In the matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari, in the pending proceeding, entitled "In the matter of the application for the extradition of Porter Charlton, under the Treaty between the United States and Italy. Writ of Certiorari. Allocatur, John Rellstab, Judge. Pierre P. Garven, Atty. for Petitioner. Office and Post Office address, 586 Newark Avenue, Jersey City, N. J. Filed January 14, 1911. H. D. Oliphant, Clerk. Chief Clerk, Dept. of State. Dec. 30, 1910. Service of copy of this paper acknowledged this day. Wm. Mc (?), Chief Clerk.

439 No. 5775.

UNITED STATES OF AMERICA,  
*Department of State:*

To all to whom these presents shall come, Greeting:

I Certify That the documents hereto annexed are true copies from the files and records of this Department.\*

In testimony whereof I, P. C. Knox Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citizenship of the said Department, at the City of Washington, this 11th day of January, 1911.

[L. s.]

P. C. KNOX,

*Secretary of State,*

By R. W. FLOURNOY, JR.,  
*Chief Bureau of Citizenship.*

440 Telegram Received.

NEW YORK, Dated June 15, 1910.

Rec'd 12.16 p. m.

P. C. Knox, Esq., Secretary of State, Washington:

Italian police believe Charlton Porter, against whom a warrant of arrest has been issued for the murder of his wife at Moltrasio, has taken passage to United States.

I beg Your Excellency to have urgent orders issued to competent authorities of New York, Philadelphia, Baltimore, Galveston and other ports of entry for his arrest.

MONTAGLIARI,

*Italian Charge d'Affaires.*

\*For the contents of the annexed document the department assumes no responsibility.

441

## Telegram Sent.

DEPARTMENT OF STATE,

WASHINGTON, *June 19, 1910.*

Marchese Paolo di Montagliari, Chargé d'Affaires of Italy, Manchester, Mass.:

Your telegram dated June 15th regarding Porter Charlton. As you are aware, under the practice obtaining between the United States and Italy under the extradition treaty existing between the two Governments, the search for, location, and apprehension in the United States for fugitives from justice of Italy is accomplished through the agency of persons employed by the Italian Government with such assistance as the local police can from time to time give in the ordinary course of their duties in connection with crimes and offenses committed in the United States. Unfortunately, there is no provision of law which in the absence of treaty stipulations places at the disposal of the Federal Government any legal or other machinery which it may use for the purpose requested in your telegram. It will, therefore, much to my regret, be impossible for me to cooperate with you in this matter in the way you suggest. It is believed, however, that representatives of your Government have never experienced difficulty in securing the cooperation of the local police officers and that such cooperation will be fully extended in this case. The matter could perhaps be best handled by and through your local consular officers.

KNOX.

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## Translation.

No. 987.

ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., *June 20, 1910.*

MR. SECRETARY OF STATE: I have the honor to acknowledge the receipt of and to thank your Excellency for the telegram received yesterday on the subject of the eventual arrest of Mr. Charlton.

It was not on the strength of the existing Treaty of Extradition that I had the honor to apply to Your Excellency with a request that you kindly take measures for the eventual arrest of the said Charlton as I presume that the Government of the United States would not grant the extradition of one of its citizens.

The case being that of the murder of an American woman in which the Department of State and the Ambassador of the United States at Rome had taken special interest, I had taken the liberty to ask Your Excellency kindly to cooperate in not letting the person charged with so heinous a crime escape punitive justice.

Accept, Mr. Secretary of State, the assurances of my highest consideration.

MONTAGLIARI.

443

## Telegram Received.

Index Bureau,  
Jun. 24 2

9.20

1910,

Dep't. of State.

From NEW YORK, Dated *June 23, 1910.*

Rec'd 7.40 p. m.

Honorable P. C. Knox, Secretary of State, Washington.

Urgent. Porter Charlton, against whom Italian Government has issued warrant of arrest for murder of his wife at Moltrasio, on or about the seventh of June, has been arrested this morning at Hoboken, New Jersey, on landing of Princess Irene and has confessed his crime to local Chief of Police.

I beg Your Excellency to kindly deliver Federal warrant pending arrival extradition documents, and to send it to me care of Italian Consulate, New York.

MONTAGLIARI.

444

## Telegram Sent.

DEPARTMENT OF STATE,  
WASHINGTON, *June 24, 1910.*

Marchese Paolo di Montagliari, Chargé d'Affaires of Italy, c/o Italian Consul, New York City, New York:

Referring to your note of June twenty and particularly to your telegram of June twenty-third in which you request a federal warrant, I have to say that the National Executive issues no federal warrant in extradition cases until the fugitive is surrendered. May I inquire if you are referring to the certificate or preliminary mandate referred to in Article two of the supplemental Extradition Convention of eighteen eighty-four? In view of the fact that Porter Charlton is understood to be an American citizen, as you indicate in your note of June twenty, I beg also to inquire whether or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your Government wishes to be understood as surrendering its view heretofore entertained and as being now willing to adopt as to cases which may hereafter arise between the two Governments, the view that the Extradition Treaties of eighteen sixty-eight eighteen sixty-nine and eighteen eighty-four between the United States and Italy require the surrender by each Government of any and all persons, irrespective of the nationality, who having been convicted for or charged with commission of any of the

445 crimes specified in the treaty within the jurisdiction of one of the contracting parties shall seek an asylum or be found within the territory of the other, and further and specifically to inquire whether the Government of Italy now proposes as to all cases arising in the future to deliver to the Government of the United

States under and in accordance with the Treaty provisions those Italian subjects who committing crimes in the United States take refuge in Italy.

KNOX.

446

Index Bureau,  
Jun-25-2  
11:47  
1910.  
Dep't of State.

Telegram received from Manchester, Mass., June 25, 1910.  
Rec'd 11:01 a. m.

His Excellency Mr. Knox, Secretary of State, Washington:

Thanking you for your telegram of yesterday, I have the honor to inform you that the document I requested by my telegram of 23rd instant was the preliminary warrant contemplated by Article two of Convention, April, 1884.

I am not able to answer second part of your telegram not having yet received instructions, but I have ground to believe that Italian Government would be willing to send all documents referring to the case should United States Government wish to have culprit judged by American courts for the crime he committed in Italy.

MONTAGLIARI.

447

Telegram Sent.

DEPARTMENT OF STATE,  
WASHINGTON, *June 25, 1910.*

Marchese Paolo di Montagliari, Italian Chargé d'Affaires, Manchester, Mass.:

In view of the fact that Charlton's arrest, to secure which the preliminary mandate described in Article two of the Convention of eighteen eighty four is issued, has, it is reported, already been secured upon the complaint of the Italian Consul; and in view of your telegram of June twenty-fifth I assume that you are now awaiting instructions from your Government.

KNOX.

448

Telegram Received.

MANCHESTER, MASSACHUSETTS,  
Dated *June 27, 1910.* Rec'd 9.30 p. m.

Honorable P. C. Knox, Secretary of State, Washington:

Urgent. Judge Blair insists on having preliminary mandate prescribed in Article two of Convention of 1884, so as to maintain arrest of Porter Charlton. I beg you, Your Excellency, to urgently send me or directly to Italian Consul, New York, the said document so that arrest of murderer be maintained until a decision can be taken on the question.

MONTAGLIARI.

449

No. 864.

JUNE 28, 1910.

SIR: I have the honor to acknowledge the receipt of your telegram of the 27th instant, concerning the case of Porter Charlton, and to enclose herewith the preliminary mandate requested.

In forwarding to you this preliminary mandate, which, as you know, has no other effect than merely to establish that extradition has been requested, without in any way involving a consideration of the legality or propriety of the extradition (which matters are determined when the extradition record is finally before the Department).

I desire to inform you that the certificate is sent with the distinct understanding that it is without prejudice to the right of this Government hereafter to determine the ultimate action to be taken by it in this case, in view of the answer already promised by the Italian Government to the question contained in the Department's telegram of the 24th instant.

Accept, Sir, the renewed assurance of my highest consideration.

P. C. KNOX.

Enclosure: As above. 25010/24. 3 G. Y. c. Marchese Paolo di Montagliari, Chargé d'Affaires of Italy.

450

Telegram Received.

MANCHESTER, MASSACHUSETTS,  
Dated *June 29, 1910.* Rec'd 10 p. m.

Honorable Huntington Wilson, Assistant Secretary of State, Washington:

Prevented to leave here. I have the honor to inform you that I will be unable to keep appointment made by telephone for tomorrow morning.

MONTAGLIARI.

451

Translation.

ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., *July 1, 1910.*

No. 1074.

MR. SECRETARY OF STATE: By telegram of June 24 last Your Excellency inquired whether in instituting extradition proceedings in the case of Porter Charlton, who confessed having committed murder at Moltrasio, the King's Government intended to depart from the rule, heretofore observed, not to surrender its own subjects and whether it was to be inferred that Italians guilty of an offense committed on American territory, who should take refuge in Italy, should hereafter be delivered without fail to the American Government.



I now have the honor to inform Your Excellency that the King's Government cannot depart from the principle established by our law that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the Extradition Convention. Indeed it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation.

The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try on the request of a foreign Government, their nationals who may have committed offenses on that Government's Territory.

Contrariwise, the laws of the United States by not permitting local tribunals to try American citizens for offenses committed abroad seem to admit of their being extradited. Otherwise an offender would, under theegis of the law itself, escape the punishment he deserves.

I have the honor to inform Your Excellency that the requisite extradition papers in the case of Porter Charlton will be forwarded to me without delay and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention.

Accept, Mr. Secretary of State, the assurances of my highest consideration.

MONTAGLIARI.

453

Translation.

ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., *July 12, 1910.*

No. 1131.

MR. SECRETARY OF STATE: In continuation of previous correspondence I have the honor to transmit herewith to Your Excellency a copy of the warrant of arrest issued June 13 last by the Examining Magistrate of the Civil and Criminal Court of Como against Mr. Porter Charlton.

Accept, Mr. Secretary of State, the assurances of my highest consideration.

MONTAGLIARI.

454

JULY 22, 1910.

SIR: The Department has received your note of the 12th instant, enclosing a copy of the warrant of arrest issued June 13th last by the Examining Magistrate of the Civil and Criminal Court of Como against Mr. Porter Charlton.

In reply I have the honor to inform you that the entire matter is now in the hands of the court, to whom all documents, papers,

et cetera, which the Italian Government may have to offer in the case should now be presented.

The copy of the warrant is returned herewith.

Accept, sir, the renewed assurances of my high consideration.

HUNTINGTON WILSON,  
*Acting Secretary of State.*

Enclosure: Copy of warrant. Marchese Paolo di Montagliari, Chargé d'Affaires of Italy. [C]25010/36. 3 Pl. Y.

455

Telegram Received.

MANCHESTER, MASS., *August 5, 1910.*

Rec'd 12:45 p. m.

Secretary of State, Washington, D. C.:

I beg Your Excellency to kindly give an answer to my note number 1229 of July 28, and to return to me documents therein enclosed in time for presentation to competent authorities.

MONTAGLIARI.

456

Telegram Received.

MANCHESTER, MASS., *Dated Aug. 5, 1910.*

Rec'd Aug. 6, 8:23 a. m.

Hon. Huntington Wilson, Washington:

Department's note and documents just received. Please accept my best thanks.

MONTAGLIARI.

457

Telegram Sent.

DEPARTMENT OF STATE,  
WASHINGTON, *August 5, 1910.*

25010/46.

Marchese Paolo di Montagliari, Italian Chargé d'Affaires, Manchester, Mass.:

Papers returned to you yesterday with note informing you that Department will in accordance with the principles of law governing its action in such matters determine the question of the issuance of a Federal warrant when the judicial proceedings in the case have been completed and the courts have held the accused for surrender.

WILSON.

458

DEPARTMENT OF STATE,  
WASHINGTON, *August 5, 1910.*

No. —.

SIR: I have the honor to acknowledge the receipt of your note of the 28th ultimo in which you transmit to this Department certain papers in the matter of the extradition of Porter Charlton, who you state has confessed to the crime of murder committed on the person of his wife at Moltrasio, Como, which crime is specified in Article II., Section 1 of the Extradition Convention of March 23, 1868, between the United States and Italy

I have the honor to return herewith the papers forwarded by you as containing the record of the proceedings conducted by the Court of Como, in the Charlton murder case. As the Department pointed out in its letter to you of July 22d, (with which it returned to you a copy of the warrant of arrest issued in this prosecution), this case is now in the hands of the court, and is not before this Department—nor will it properly be before the Department until the extradition magistrate shall have committed the accused for surrender—and, therefore, as the Department has already stated, all documents, papers, etc., which the Italian Government may have to offer in the case, should be presented directly to the court now having the case in charge.

Concerning your request for the issuance of a "Federal 'Warrant'," I have the honor to call your attention to the Department's telegram of June 24, in which you were informed that under the extradition procedure followed in this country the National Executive issues no Federal warrant in extradition cases until the  
459 fugitive is surrendered; and surrender takes place only after the matter has been fully considered by the courts and by the Department which reviews the decision of the courts, both branches of the government having to concur in the surrender. It is not perceived that there is anything in the present case which requires any variation from the regular procedure uniformly followed in extradition cases (even were such a course possible, as it is not, under American law), for which procedure the Department is pleased to refer you to the following cases in which extradition proceedings have been instituted by the Government of Italy:

Liberantonio Merolle (1907).

Francisco Surace (1908).

Pellegrino Mule (1908) and

Settimio Perrotta (1908).

In view of your remark that the Department has already issued a "preliminary certificate of arrest" in this case, I am constrained again to direct your attention to the actual situation set forth in the Department's letter to you of June 28th (which enclosed the preliminary mandate requested), in which you were advised that such mandate had no other effect than to indicate that extradition would be requested and that its issuance did not in any way involve a consideration of the legality or the propriety of the extradition—matters to be determined when the extradition record was finally before the Department. The Department at that time also informed you that the certificate was sent with the distinct understanding that it should be without prejudice to the right of this Government hereafter to determine the ultimate action to be taken in this case.

The question of the issuance of the Federal warrant of  
460 surrender will be considered when the case is formally and properly before the Department for final determination.

Accept, sir, the renewed assurances of my high consideration.

HUNTINGTON WILSON,

*Acting Secretary of State.*

Enclosures: Papers as above.

Marchese Paolo di Montagliari, *Chargé d'Affaires* of Italy.

461

DEPARTMENT OF STATE,  
WASHINGTON, *December 9, 1910.*

MY DEAR MR. AMBASSADOR: I have the honor to inform you that I have this day decided to surrender Porter Charlton to your Government in furtherance with its request. A more formal notification will be sent you tomorrow.

I am, my dear Mr. Ambassador,  
Very sincerely yours,

P. C. KNOX.

His Excellency, Marchese Cusani Confalonieri, Embassy of Italy.

462

No. —.

DEPARTMENT OF STATE,  
WASHINGTON, *December 10, 1910.*

EXCELLENCY: In compliance with the request made by your Embassy in its note of July 28 last, and in pursuance of existing treaty stipulations between the United States and Italy, I have the honor to enclose a warrant of surrender in the case of Porter Charlton, charged with murder committed within the jurisdiction of the Kingdom of Italy, and examined and committed for surrender by the Honorable John A. Blair, Judge of the Court of Common Pleas in and for the County of Hudson in the State of New Jersey.

Accept, Excellency, the renewed assurance of my highest consideration.

P. C. KNOX.

Enclosure: Warrant of surrender.

His Excellency, Marchese Cusani Confalonieri, Ambassador of Italy.

463

AMBASCIATA D'ITALIA,  
WASHINGTON, *December 10, 1910.*

MY DEAR MR. KNOX: I am very thankful to your Excellency for so promptly advising me of your decision in reference to the matter of the extradition Charlton Porter, the formal notification of which I shall expect to receive in due course according to your letter.

I am, my dear Mr. Secretary of State,  
Very sincerely yours,

CUSANI.

His Excellency, The Hon. P. C. Knox, Secretary of State.

464

AMBASCIATA D'ITALIA.

As the attorneys for Porter Charlton are going to fight his extradition, the Italian Embassy would like to be informed if the Department of Justice will take charge of sustaining the decision already rendered by the Hon. Knox in the matter, and consequently will fight, with the assistance of the United States Attorneys, the arguments of the appealing party before the Federal Courts.

Washington, 13 Dicembre, 1910.

Under the extradition treaty between the United States and Italy, as well as under the laws of the United States, the presentation of the case of Italy before the Federal Courts in the proceedings upon habeas corpus which have been instituted by the fugitive will, like the proceedings before the committing magistrate, rest upon such persons as may be designated for that purpose by the Italian Government, the Department of Justice of the United States having no power or authority to represent the Italian Government in this matter.

Washington, December 14, 1910.

(Handed to the Italian Ambassador by Secretary Knox on December 15, 1910.)

No. 1966.

**Urgent.**

ROYAL ITALIAN EMBASSY,  
WASHINGTON, D. C., 23 December, 1910.

MR. SECRETARY OF STATE: I have the honor to inform your Excellency that under the date of the 24th instant the Attorney, Pierre P. Garven, chosen by the Consul-General of Italy in New York to represent the Government of the King in the appeal proceedings for the extradition of Charlton Porter, has addressed to the Consul-General the following request:

"Kindly write to the Secretary of State at Washington for a certified copy of the warrant of surrender in the Charlton case. When you have received the same, kindly send it to this office so that I can serve it upon Sheriff Kelly. It is very important that this matter be attended to at once."

I beg your Excellency to examine this request and to thereupon take in this connection whatever action may be appropriate, informing me *therefore* so that I may be able to give an answer to the Consul-General at New York as soon as possible.

Accept, etc.

CUSANI.

No. 1973.

**Urgent.**

ROYAL ITALIAN EMBASSY,  
WASHINGTON, December 26th, 1910.

MR. SECRETARY OF STATE: According to the verbal request of the State Department I hastened to have the Royal Consul General

in New York ask the Attorney Garven why he asked for the duplicate of the document to which my previous note of the 23rd instant to Your Excellency referred, instead of using the original.

From the telegraphic answer which I received from the aforesaid Consul General it appears that Mr. Garven wishes to serve the Sheriff Kelly with a duplicate of the Warrant of Surrender, because he does not deem convenient, at the present state of the case, to do away with the original which he might need during the discussion of the case.

In informing Your Excellency as above, I beg Your Excellency to kindly put me in condition to give an answer to the aforesaid request.

Accept, etc.,

CUSANI.

468

No. 34.

DEPARTMENT OF STATE,  
WASHINGTON, *December 29, 1910.*

EXCELLENCY: I have the honor to acknowledge the receipt of your two notes of the 23rd and 26th instant in which you communicate the request made by the attorney for the Italian Government, in the matter of the extradition of Porter Charlton, for a certified copy of the warrant of surrender issued by the Department in that case.

I have the honor to say in reply that while the Department would be glad to meet the wishes of the attorney for your Government if it could properly do so, it is the opinion of the Department that the original warrant of surrender now in your hands will serve all the purposes desired.

Accept, Excellency, the renewed assurance of my highest consideration.

P. C. KNOX.

His Excellency, Marchese Cusani Confalonieri, Ambassador of Italy.

469 6082. United States Circuit Court, District of New Jersey.  
17-105. In the matter of Paul Charlton for writ of habeas corpus, &c. Copies of correspondence between Secretary of State and Italian Government returned under Order of Jan. 4, 1911. Filed January 12, 1911. H. D. Oliphant, Clerk.

470

No. 5776.

UNITED STATES OF AMERICA,  
*Department of State:*

To all to whom these presents shall come, Greeting:

I Certify That the documents hereto annexed are true copies from the files and records of this Department.\*

\* For the contents of the annexed document the department assumes no responsibility.

In testimony whereof I, P. C. Knox, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citizenship of the said Department, at the City of Washington, this 11th day of January, 1911.

[L. S.]

P. C. KNOX,  
*Secretary of State,*  
By R. W. FLOURNOY, JR.,  
*Chief, Bureau of Citizenship.*

471

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

NEW YORK, *July 25, 1910.*

The Honorable Secretary of State, Washington, D. C.

SIR: Referring to my favor to you of the first of July and your answer of the 6th, I would respectfully request a certified copy of the following diplomatic correspondence in your office, namely:

1. A certified copy of the letter from Mr. Hay, Secretary of State, to the Governor of Massachusetts, Feb. 11, 1899, 234 MSS. Domestic letters 504.

This letter is needed as being a formal recognition by the Department of State of the United States of America of the Italian Construction placed upon the Treaty of Extradition of 1868 as not covering citizens of either country to be extradited from the citizenship of domicile to the place of crime.

2. Letter from Mr. Uhl Acting Secretary of State, to the Governor of New York, February 13, 1894, 195 MSS. Domestic Letters 443, to the same effect.

In this connection it will be noted that the Italian construction of the treaty indicates that the magistrate attempting to hold Charlton in this case has no jurisdiction in the premises, and the letter is needed for that purpose as the extradition does not come within the terms of the treaty as construed by Italy.

Under the circumstances and in view of the fact that extracts from these documents are published with the approval of the State Department in Moore's Digest of International Law thereby indicating that no public interests are involved to the contrary of their publicity, I hope that you will find yourself able to act in accordance with the request above made.

Thanking you in advance for any courtesy in the premises, I am,  
Sir,

Your obedient servant,

R. FLOYD CLARKE.

473

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

NEW YORK, *July 28, 1910.*

The Honorable Secretary of State, Washington, D. C.

SIR: Referring to the case of Porter Charlton and the provision



in the Treaty between the United States and Italy, being the Convention of 1884, amending the Treaty of 1868, under which the requisition is to be accompanied by the documents mentioned in Article 5 of the Treaty, I would respectfully request that if and whenever the Italian Government shall make requisition upon your office for the extradition of the said Porter Charlton, accompanied by the documents mentioned, you will inform me of such fact.

The arrest was made on June 23, 1910, and under the provisions of the Treaty if this formal demand, supported by the evidence as therein provided, is not made within forty days from the date of the arrest, the prisoner is entitled to his liberty, and it is important that, as attorney for the prisoner, I should be advised when any such demand, accompanied by the documents mentioned in the Treaty, has been properly made on your Department.

Thanking you for your courtesy in the premises, I am, Sir,

Your obedient servant,

R. FLOYD CLARKE.

474

DEPARTMENT OF STATE,  
WASHINGTON, August 1, 1910.

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: I acknowledge the receipt of your letter of the 25th instant, in further reference to certain papers desired by you for use in connection with the case of Porter Charlton.

The attitude of the Department in connection with your inquiries is set forth in the Department's letter to you of July 6, in which you were informed that the Department could furnish copies of its records for use as evidence in the courts in those cases only in which such action would not be prejudicial to the public interests and in which it could be affirmatively made to appear that the paper requested was relevant to some point under judicial consideration and that substantial justice required that it should be furnished; and further that before such records could be so furnished it would be necessary for the court, before which the case was pending, to indicate its desire that it be furnished, for its information, copies of the correspondence designated in the request.

This letter set forth the general rule of the Department in such cases and the Department has, therefore, again to suggest that it would not consider it proper to furnish the correspondence desired by you upon your request, but that it will be pleased carefully to consider any request which a competent Court may see fit to make.

I am, Sir,

Your obedient servant,

ALVEY A. ADEE,  
*Acting Secretary of State.*

25010/30.

475

DEPARTMENT OF STATE,  
WASHINGTON, August 2, 1910.

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: I acknowledge the receipt of your letter of July 28th, in further reference to the case of your client, Porter Charlton.

Your request that you be informed if and whenever the Italian Government shall make request upon this Department for the extradition of Porter Charlton will be complied with.

I am, Sir,

Your obedient servant,

ALVEY A. ADEE,  
*Acting Secretary of State.*

25010/42.

476

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

NEW YORK, August 5, 1910.

The Honorable Secretary of State, Washington, D. C.

SIR: Referring to your communication of August 1st in answer to mine of July 25, 1910, I would say that I am about to apply to the Hon. John A. Blair, of the Court of Oyer and Terminer, Hudson County, New Jersey, the Magistrate before whom the Charlton case is pending, for a request on your Department for certified copies of the Diplomatic correspondence which I have already requested.

In doing so, I desire to furnish to him copies of my letters to you of the 1st and 25th of July, and of your answer of August 1st. Please advise me whether I have your permission so to do.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE.

477

DEPARTMENT OF STATE,  
WASHINGTON, August 9, 1910.

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: I acknowledge the receipt of your letter of August 5th, in regard to certain correspondence referring to the Charlton case.

The Department sees no objection to your furnishing to the Court copies of your letters of July 1st and 25th, and the Department's reply of August 1st.

I am, Sir,

Your obedient servant,

HUNTINGTON WILSON,  
*Acting Secretary of State.*

25010/48.

478

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

IN RE PORTER CHARLTON.

NEW YORK, Aug. 10, 1910.

The Honorable Secretary of State, Washington.

SIR: Referring to my letter to you of July 28th, 1910, in which I requested you to kindly inform me when, under the provisions of

the Treaty between the United States and Italy, there should be presented to your Department the formal demand for the extradition of Porter Charlton accompanied by the documents mentioned in Article V of the Treaty, and your reply of August 2, 1910, in which, after acknowledging receipt of the letter, you state that you will inform me whenever such request is made by the Italian Government, I would call your attention to the fact that there have appeared in the public press various news items to the effect that some document of the kind in question was presented to your Department.

Under the circumstances I respectfully beg to be informed whether up to date there has been presented to your Department any formal demand for the extradition of Porter Charlton accompanied by the documents mentioned in Art. V of the Treaty of 1868 as amended by the Convention of 1884.

Thanking you for your courtesy in the premises, I am, Sir,

Your obedient servant,

R. FLOYD CLARKE.

479

DEPARTMENT OF STATE,  
WASHINGTON, August 15, 1910.

Mr. R. Floyd Clarke, 37 Wall Street, New York.

SIR: I acknowledge the receipt of your letter of the 10th instant in further reference to the case of Porter Charlton.

The Department recently received from the Italian Government documents said to contain evidence of the guilt of Charlton of the crime with which he is charged, and the documents were accompanied with a request for a Federal warrant. The documents were, however, returned to the Embassy with the statement that they were not now properly presentable to the Department, which had nothing to do with the case (which was now before the courts), until the judicial proceedings should be finished and the accused finally committed for surrender, and that the question of issuing the warrant of surrender would be considered when the case was properly submitted to the Department for determination.

I am, Sir,

Your obedient servant,

HUNTINGTON WILSON,  
*Acting Secretary of State.*

25010/50.

480

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

In re Case of PORTER CHARLTON.

NEW YORK, *Sept. 1, 1910.*

The Honorable The Secretary of State, Washington, D. C.

SIR: Thanking you for your communication in the case of Porter Charlton of August 15th, in which you state that "the Department

recently received from the Italian Government documents said to contain evidence of the guilt of Charlton of the crime with which he is charged and the documents were accompanied with a request for a federal warrant. The documents were, however, returned to the embassy with the statement" etc., and referring to the statement in the public press to the effect that the documents in question were returned unopened by the Department to the Italian Embassy, I would respectfully inquire whether, upon presentation to the Department, the documents in question were marked as received, or were merely returned without opening and without endorsement for the reasons set forth in your letter above referred to?

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,  
*Attorney for Porter Charlton.*

481

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

In re Case of PORTER CHARLTON.

NEW YORK, *Sept.* 12, 1910.

The Honorable Secretary of State, Washington, D. C.

SIR: Referring to my favor to you of August 10th and your answer of the 15th, in which you state that the Department recently received from the Italian Government documents said to contain evidence of the guilt of Charlton of the crime of which he is charged and the documents were accompanied with a request for federal warrant, will you kindly inform me of the exact day and hour when said documents and request were received by the Department?

The case is set for trial for September 21, 1910, the provisions of the treaty require that these documents shall be forwarded to the State Department within forty days from the arrest, and this date is of importance to my client for the reasons stated.

Under the circumstances, I request your prompt answer, and your permission to use the answer as evidence of the date of the receipt of the documents if the facts as so developed may be of advantage to my client.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,  
*Att'y for Porter Charlton.*

482

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

In re PORTER CHARLTON.

NEW YORK, *Sept.* 16, 1910.

The Honorable Secretary of State, Washington, D. C.

SIR: Referring to my letter to you of August 10th, which you answered on the 15th, and my letters of September 1st and 12th,

which up to date remain unanswered, I would respectfully advise you that I have recently obtained a translated copy of the documents which the Italian Government has presented to the Court of Oyer and Terminer, Judge Blair presiding.

These papers contain the evidence of the Italian Government on the question of the perpetration of the crime and the surrounding circumstances and the probable identity of the criminal.

They do not contain, however, any formal demand on the part of the Italian Government to the United States Government or to the Court of Oyer and Terminer for the extradition of Charlton.

As such formal demand in addition to the original requisition mentioned in the Treaty of 1868 is absolutely required by the amendment of Article V under the Convention of June 11, 1884, the fact of whether such a formal demand in connection with the papers supporting by the evidence the commission of the  
483 crime, etc., as in the treaty provided has been made, is essential to be presented to the Court on the question as to whether the Italian Government has complied with the Treaty in formally demanding extradition.

As indicating to your good judgment the fact that our insistence upon this pre-requisite that a formal demand shall be made by the Italian Government before further proceedings shall be had herein is warranted, I would call your attention to the fact that the treaty calls for two pre-requisites to its operation:

1st. The original requisition of the Italian Government or of the Secretary of State.

On this the mandate issues for a preliminary arrest, and I understand that these pre-requisites have been performed in this case.

In addition, the treaty expressly provides as follows:

"And the person thus accused and imprisoned shall, from time to time, be remanded to prison until a formal demand for his or her imprisonment shall be made and supported by evidence as above provided" etc.

We have inspected a copy and translation of the supporting evidence.

I have been informed by the Prosecutor's office in Hudson County that no formal demand has been filed there, and I am therefore anxious to know if it has been filed in your Department, and, if so, when.

It is important that I should know this, as the hearing before Judge Blair has been fixed for Wednesday, September 21st, at 10 a. m.

Under the circumstances I trust you will extend to me the courtesy of an early reply to the following questions:

484 1st. Has a formal demand for the extradition of Porter Charlton, independent of the original request for a warrant, been filed in your office;

2nd. At what date, if any, the same was filed; and

3rd. Certified copy of the same with memorandum of its filing for use before the Judge at the trial;

4th. Certificate that no such formal demand has been filed in your office, for like use.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,  
*Attorney for Porter Charlton.*

485

Telegram Received.

From NEW YORK, Dated *Sept. 20, 1910.*  
Rec'd 4:25 p. m.

The Honorable the Secretary of State, Washington:

Referring to the Charlton case and my letter to you of twenty-first instant I respectfully request that you forward to me for use in court to-morrow, Wednesday morning, certified copies of original requisition for a warrant and the formal demand for his extradition independent of the request for a warrant, or a certificate that no such demand has been made, with dates, etc.

R. FLOYD CLARKE,  
*Attorney for Porter Charlton.*

486

Telegram Received.

From NEW YORK, Dated *Sept. 20, 1910.*

The Honorable the Secretary of State, Washington:

Referring to the Charlton case and my letter to you of eighteenth instant I respectfully request that you forward to me for use in court to-morrow, Wednesday morning, certified copies of original requisition for a warrant and the formal demand for his extradition independent of the request for a warrant or a certificate that no such demand has been made with dates, etc.

R. FLOYD CLARKE,  
*Attorney for Porter Charlton.*

487

DEPARTMENT OF STATE,  
WASHINGTON, *September 20, 1910.*

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: The Department has received your letter of the 12th instant, inquiring the exact time of receipt at this Department of certain documents from the Italian Government said to contain evidence of the guilt of Porter Charlton, your client.

In reply you are informed that the communication in question from the Italian Government was received at the State Department on July 30, 1910.

I am, Sir,

Your obedient servant,

HUNTINGTON WILSON,  
*Acting Secretary of State.*

211.65 C 38/1.

488 Copy—F

DEPARTMENT OF STATE,  
WASHINGTON, *September 21, 1910.*

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: The Department has received your letter of the 16th instant, making certain inquiries regarding the Charlton matter.

It would seem that, should you feel that the treaty requirements have not been complied with in this case, you should present the matter in a proper form and at the appropriate stage of the proceedings to the court having the matter in charge.

I am, sir,

Your obedient servant,  
(Signed)HUNTINGTON WILSON,  
*Acting Secretary of State.*

211.65 C 38/2.

3 F Y.

JRC.

489

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

In re PORTER CHARLTON Case.

NEW YORK, *Sept. 21, 1910.*

The Honorable Secretary of State, Washington, D. C.

SIR: Referring to my letter to you of September 16th and my telegram to you of September 20th, 1910, I again respectfully request that you forward to me, as quickly as possible, the following documents:

1st. A certified copy of the original requisition of the Italian Government upon the Secretary of State for the preliminary arrest of Porter Charlton, which was the basis of your mandate in the case issued on June 28th, 1910.

2nd. A certified copy of the warrant for his arrest in the country where the crime may have been committed, if any such did accompany said request for surrender.

3rd. A certified copy of the depositions upon which such warrant may have been issued, if any such did accompany the requisition as aforesaid.

4th. A certified copy of the formal demand, if any, made by the Italian Government for the extradition of Porter Charlton, succeeding the original requisition as aforesaid, as required by the amendment to Article 5 under the convention of 1884 additional to the Extradition Convention of 1868, and, in addition thereto, the dates and times when the said various documents, and each  
490 of them, were presented and filed in your office if any.

In case any of these documents have not been presented or filed in your office in connection with the original requisition, please so certify.

I am, sir,

Your obedient servant,

R. FLOYD CLARKE,  
*Attorney for Porter Charlton.*



491

DEPARTMENT OF STATE,  
WASHINGTON, *September 22, 1910.*

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: The Department acknowledges the receipt of your two telegrams of the 20th instant, in regard to certain documents concerning the case of Porter Charlton, your client, and refers you in reply to its letter of the 21st instant.

I am, sir,

Your obedient servant,

HUNTINGTON WILSON,  
*Acting Secretary of State.*

211.65 C 38/3-4.

492

R. Floyd Clarke,  
Attorney and Counsellor at Law,  
37 Wall Street.

In re PORTER CHARLTON.

NEW YORK, *Sept. 22, 1910.*

The Honorable the Secretary of State, Washington, D. C.

SIR: I am just in receipt of your communication of the 21st instant in answer to my letter of the 16th instant.

In this connection I would call your attention to the fact that my letter of the 16th instant, besides making certain inquiries as to the state of record in your Department on the extradition proceedings in the Charlton case, also requested you specifically to furnish me:

1st. A certified copy of the formal demand, if any, for the extradition of Porter Charlton, independent of the original request for a warrant; or

2nd. A certificate that no such formal demand had been filed in your Department, if such were the case, for like use.

In this connection I afterwards supplemented this request for certified copies by my telegram of the 20th inst., in which I requested:

1st. Certified copies of the original requisition for a warrant; and

493 2nd. Certified copies of the formal demand for the extradition, independent of the request for a warrant; or

3rd. Certificate that no such demand had been made, with dates, etc.

And on the 21st instant I supplemented said requests by the further request for certified copies as follows:

1st. A certified copy of the original requisition of the Italian Government upon the Secretary of State for the Preliminary arrest of Porter Charlton, which was the basis of your mandate in the case issued on June 28th, 1910.

2nd. A certified copy of the warrant for his arrest in the country where the crime may have been committed, of any such did accompany said request for surrender.

3rd. A certified copy of the depositions upon which such warrant may have been issued, if any such did accompany the requisition as aforesaid.

4th. A certified copy of the formal demand, if any, made by the Italian Government for the extradition of Porter Charlton, succeeding the original requisition as aforesaid, as required by the amendment to Article 5 under the Convention of 1884 additional to the extradition convention of 1868, and, in addition thereto, the dates and times when the said various documents, and each of them, were presented and filed in your Department, if any.

In case any of these documents have not been presented or filed in your Department in connection with the original requisition, please so certify.

In your letter of the 21st instant, above referred to, you state:

“It would seem that should you feel that the treaty require-  
494 ments have not been complied with in this case, you should present the matter in a proper form and at the appropriate stage of the proceedings to the court having the matter in charge.”

As to this, I would respectfully call your attention to the fact that, as I have heretofore advised you, my repeated requests for certified copies of what record there may be of this case in your Department has been for the purpose of presenting the matter in a proper form and at the appropriate stage of the proceedings, to the Court having the matter in charge, for, without the record in your Department as to the proceedings taken by the Italian Government for the extradition of the prisoner, or certified copies of that record, it is impossible to determine whether the Italian Government has taken the necessary steps which are required by the treaty for the purposes of his extradition so as to give the court any jurisdiction in the premises.

Of course the burden of proof is on the prosecution to establish a compliance with the strict requirements of the treaty, but, as a matter of precaution, and for the purpose of establishing the facts as they are, even though they constitute a negative, my requests for certified copies or a certificate that no such documents were in your Department, were for the purpose of presenting to the court the record of the transactions between the governments in regard to this matter—a record without which it is impossible to determine, except on the basis of the burden of proof, the compliance or non-compliance of the Italian Government with the pre-requisites of the extradition of the prisoner in this case.

The treaty clearly provides, after the insertion of the  
495 amendment to Article V by the additional convention of 1884—

1st. For a requisition, whether accompanied by a copy of the warrant or of the depositions, or merely a preliminary requisition; and

2nd. A formal demand for his or her extradition, in addition to the original requisition; and further provides “that if the requisition, together with the documents above referred to (which include the warrant or the depositions and the formal demand) shall not be

made \* \* \* within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

The state of the records of your Department, therefore, as to what action has been taken by the Italian Government to comply with these requirements, is the basis of one of the legal questions involved in this case as to whether the man is extraditable under the forty-day clause in this proceeding.

In view of the diplomatic dispute which has existed between the governments, which began about twenty years ago, as to whether the word "persons" in the treaty includes citizens of the asylum country, and the fact that the Italian Penal Code of 1890, by its Article 9, has enacted that no Italian citizen shall be extradited, thereby abrogating and repealing any covenant to this effect that might have been contained, expressly or by implication, in the treaties of 1868 and 1884 the insistence in this case upon proof of the formal demand required under the treaty within the forty days is not an insistence upon merely a question of time but an insistence upon a question of substance.

For while the original requisition of the Italian Government in this case might have been made in ignorance of the citizenship of Charlton, and Italy not thereby been bound to our construction of the treaty by her making such original requisition,

Italy has since received full notice of his citizenship, and any formal demand made by that government after such notice would be in the nature of a waiver of her former construction of the treaty—a waiver which is scarcely permissible to be made by her foreign department in view of her Penal Code, but which, if made, would be of great importance to this government.

For this reason, the insistence upon this formal demand as part of the extradition papers is one of as much importance to the public policy in the matter hitherto advocated by your Department as it is to the prisoner.

Accordingly, as Section 882 of the U. S. Revised Statutes provides that "copies of any books, records, papers or documents, in any of the executive departments, authenticated under the seal of such departments respectively, shall be admitted in evidence equally with the originals thereof," I have, pursuant to the authority granted by that section duly requested your Department to furnish me with certified copies of their record in this case for use in this hearing.

I know of no other way to present the matter to the court, in a proper form and at the appropriate stage of the proceedings, than to prepare beforehand, either by taking the depositions of the officers of your Department, or by obtaining certified copies of your records, so as to be able to present to the court the facts which are germane to the issue.

As I did not desire to take up your time or mine unnecessarily in issuing commissions to take depositions, and as the statute gave full authority to use certified copies in the premises, and as the same were documents in your Department, which is one of the Executive Departments of the Government of the United States, the production of which, under the circumstances of this case,

was not inimical to the public interests, for the purposes of this hearing, as being the actual record in the case necessary for its proper presentation to the court, in that they constituted the very record on which the extradition may or must not be granted, I requested your Department to furnish certified copies as being the method whereby with the least inconvenience to your Department and the least expense to the prisoner, the matter could be presented in a proper form and at the proper stage of the proceedings to the court having the matter in charge.

Trusting that, after this full explanation of the materiality and legality and necessity of my request for these certified copies made as above, you will see your way clear to furnish them to me as requested, in time to be presented and made a part of the record in this matter the prosecution having failed to present them, and the objection having been taken on that ground, while I wish to present before the court and before you every item of fact as they existed and not under mere presumptions, I respectfully request that the documents in question be furnished as heretofore requested as soon as conveniently may be.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,  
*Attorney for Porter Charlton.*

498

DEPARTMENT OF STATE,  
WASHINGTON, *October 1, 1910.*

Mr. R. Floyd Clarke, 37 Wall Street, New York City.

SIR: In reply to your letters of the 21st and 22nd ultimo, in further reference to the case of Porter Charlton, you are referred to the Department's letter of the 21st ultimo wherein you are informed that, should you feel that the Treaty requirements have not been complied with in this case, it would seem that you should present the matter in a proper form and at the appropriate stage of the proceedings to the Court having the matter in charge.

It may be added that this sets forth the uniform attitude and practice of the Department on these matters, and no sufficient reason is perceived that would call for or justify a different course in this case.

I am, Sir,

Your obedient servant,

ALVEY A. ADEE,  
*Acting Secretary of State.*

211.65 C 38/5-6.

499      6082. United States Circuit Court, District of New Jersey. 17-105. In the matter of Paul Charlton, for writ of habeas corpus, &c. Copies of correspondence between Secretary of State and R. Floyd Clarke returned in compliance with order of Jan. 4, 1911. Filed January 12, 1911. H. D. Oliphant, Clerk.

500 United States Circuit Court, District of New Jersey.

In re PORTER CHARLTON.

On Habeas Corpus, &amp;c.

On Petition of Paul Charlton for a Writ of Habeas Corpus and Writs of Certiorari, etc., in Aid Thereof.

R. Floyd Clarke, for petition.  
Pierre P. Garven, opposed.

STATES HOUSE, TRENTON, N. J.,  
*January 23, 1911.*

RELLSTAB, District Judge (at the conclusion of the argument):

The Question before me is whether there is legal ground for the present incarceration of Porter Charlton, for the purpose of having him removed to Italy. It arises on a writ of habeas corpus and certiorari and orders issued in aid thereof.

The testimony taken before the committing magistrate and the proceedings had in the Department of State in relation to such imprisonment are before me.

The writ of habeas corpus is not one in the nature of a writ of error. I have no other concern with the findings of the committing magistrate than to inquire whether they are based upon competent legal evidence, nor with the transactions before the Secretary of State than to ascertain whether the Kingdom of Italy made a formal demand for the extradition of Charlton.

Porter Charlton is charged with having committed the crime of murder in Italy. He was there at the time the murder is  
501 said to have been committed; he fled that country and was arrested as he was landing in this country.

The proceedings instituted against him in this State, began with a complaint under oath by the Vice Consul of the Italian Government, charging him with the commission of murder; he was apprehended, the warrant being issued by his Honor John R. Blair, Judge of the court of Oyer and Terminer of the County of Hudson of this State. At the hearing, evidence was produced which satisfied the committing magistrate that he was a fugitive from justice; that he was the person desired by the Italian Government; and that there was probable cause for holding him for trial. Thereupon he committed him to the County Jail of Hudson County to await the surrender by the National Government.

It is said in his behalf that the committing magistrate refused to receive evidence of the prisoner's insanity, and that that was legal error. It will be observed that that attack is not made upon the competency of the evidence brought before the magistrate, but because he refused to receive what, in the judgment of the petitioner's counsel was not only competent, but necessary evidence to be considered before extradition could be ordered; the point being that the individual, no matter how well identified as the person who com-

mitted the act of killing, could not be held legally responsible for that act unless he was a sane person; and therefore, evidence of his insanity should have been received.

It is contended in that behalf that the committing magistrate should have received evidence, first, as to his sanity at the time of the commission of the act; and second, as to his sanity at the time of the hearing. Counsel for the Italian Government stated that  
502 it was not his mental condition at the time of the hearing that was sought to be established, but his mental condition at the time of his arrest.

Mr. CLARKE: That is not the fact, Your Honor.

The COURT: I will pass that distinction, and assume that it is not correct. I will review the question as if the purpose was to examine into his then mental condition.

He was apprehended in the State of New Jersey, and of course, the first question that presents itself with relation to the matter of insanity is whether that was a proper subject for examination by the committing magistrate. When a man is put upon his trial upon a charge of crime, it is upon the double presumption that he was sane when the act was committed and at the time he is put to his defense. Upon proper allegation a judicial inquiry is instituted to determine whether he is mentally capable of making a defense. This is not, properly speaking, a defense. It is preliminary to the trial itself. The question of his sanity at the time of the commission of the act, is a defense. Therefore, a man may be sane at the time of committing an offense, still, if he subsequently becomes insane, he may not be tried for such crime during insanity. He may be put on his trial when he is restored to sanity. It follows, therefore, that insanity as a prevention of trial can only be raised at or immediately before his trial, and only in the forum provided by the jurisdiction which he is alleged to have outraged. Until the trial is moved such preliminary investigation cannot be insisted upon, for the authorities may, at their own motion, await returning sanity. Such an inquiry is not proper upon the hearing before the  
503 committing magistrate, whose function is merely to determine whether a crime has been committed, and whether the evidence indicates that the accused committed it. Nor can it be raised before the grand jury, whose function it is to sift the evidence on the part of the state, and determine whether sufficient cause appears to put the accused upon trial. Therefore, upon extradition proceedings, an inquiry into the present sanity of the person arrested is improper. The state or kingdom whose laws have been violated, and whose duty it is to vindicate them, is the only authority to make this investigation, to be instituted by them preliminary to the trial upon the merits. The question of the sanity of the prisoner at the time of the hearing, was therefore, not one to be investigated by the Committing magistrate.

The question of the prisoner's sanity at the time of the commission of the crime as already stated is a matter of defense and one that can be interposed only when he shall be put on his trial on the merits. That inquiry in the present case requires an examination



of the prisoner's mental condition and conduct at and about the time of the commission of the crime. The witnesses to testify to such facts are in a foreign country, easily accessible at the place of trial, and whose production here would be attended with great difficulty and considerable expense.

While his present sanity is a question that will depend upon his mental state and conduct evidenced in this country at this time, the question of his previous sanity is one that relates to surroundings in another country, and at a much earlier period of time. The standard of sanity of the country whose justice has been violated governs. It is lamentable of course, that there should be a different standard on that very important question, but such is the fact.

The first inquiry may not now be made, because it would be premature, as, if he were now pronounced to be insane, he might be sane when the trial upon the merits shall be ready to be moved. A present determination, therefore, on that question, would be inconclusive.

The second inquiry, being one that relates to his defense, could be entertained by the committing magistrate, as the proceeding before him was but a hearing, and not a trial.

The next contention is that under our constitution, the accused being an American citizen, cannot be extradited unless there is a positive obligation on the part of the United States to surrender its citizens when accused of having committed a crime in a foreign country. To extradite, unless there is a positive obligation, is said to be contrary to the constitutional guarantee generally known as the "due process of law" provision in our constitution; that in a government like ours with its constitutional limitations, no American citizen can be surrendered to another country merely out of courtesy or in a spirit of international comity.

Reduced to its last analysis that contention, I think, is to be determined by this; whether there is an existing treaty between the United States and Italy which requires that Charlton shall be surrendered to the demanding Government. An extradition treaty was entered into in 1868 between this country and Italy, and amended in 1884.

In the preamble to the original treaty, it is declared that "With a view to the better administration of justice and the prevention of crime \* \* \* That persons convicted of or charged with the crimes hereinafter specified \* \* \* be reciprocally delivered up."

In article I both governments "mutually agree to deliver up persons who \* \* \* shall seek an asylum or be found within the territory of the other."

In article 2 it is provided that "persons shall be delivered up who shall have been convicted of or be charged \* \* \* with any of the following crimes: First, murder,"

The Italian government has given the word "persons" used in this treaty an interpretation so as to exclude citizens or subjects of the respective countries, and has persistently refused to surrender any



Italian subject who has returned there fugitive from the justice of this country.

The contention on behalf of the prisoner is that this construction is either the true one, with the result that Charlton may not be extradited; or, if incorrect, is such a repudiation of a reciprocal obligation, as to amount to an abrogation of the treaty; with the result that he, being an American citizen, cannot at the option of the executive branch of the government, be surrendered, because that would be in violation of Charlton's constitutional rights, namely, not to be deprived of his liberty except by "due process of law."

If an extradition treaty subsists with a foreign government, under our constitution and law of the land, a surrender of the prisoner in pursuance thereof, would be in accordance with the "due process of law" constitutional requirement. Neither the executive branch of our government, though strenuously objecting to this construction placed upon the word "persons" by the Italian government, nor the legislative branch, has taken any steps to a formal  
506 abrogation of the treaty. But the very persistence of the

Italian government in its refusal has led the American government to desist from any further application for the return to this country of Italian subjects charged with the commission of crime here and who have fled to their own country for an asylum. But that, in my judgment, cannot be construed as an abandonment by this government of its contention that the proper construction of the word "persons" includes subjects and citizens, or as an acknowledgment that the treaty has been abrogated. The executive department has always acted with reference to such treaty as if it were subsisting, and in this particular case has ordered the surrender of Charlton.

On behalf of the latter it is insisted that such provisions are necessarily reciprocal, and are of binding force only so long as they are reciprocally complied with; that upon the deliberate refusal on the part of the Italian government to surrender its *won* subjects, and thus deny the general and comprehensive meaning of the word "persons," such provisions, *ipso facto*, were abrogated.

In this behalf it is further contended that while under the principles of international law the sovereignty has the option, and might exercise it, to surrender one of its citizens a fugitive from another's justice, yet that that option could not be exercised by the executive branch of our government because of the "due process of law" constitutional guarantee, but that such option could be exercised only by Congress or the treaty-making power; that as the sovereignty was under no obligation to surrender, and only had the power of option in the premises, the rights of an American  
507 citizen could not be invaded except by the intervention of the legislative power who, in such matters is supreme, and in relation to which the executive was but the agent.

On the question of the construction of the treaty it was contended that the construction placed thereon by the diplomatic branch of the government, viz., that the word "persons" included American

citizens, and that this country was bound to surrender its citizens, notwithstanding the position taken by the legislative and diplomatic departments of the Italian government refusing to deliver or permit to be delivered their own citizens finding an asylum in that country, was not the true one, and could not be binding upon either Charlton or the courts. Undoubtedly, in view that treaties are made a part of the supreme law of the land by the constitution which authorizes them the courts are bound to construe such treaties as they are bound to construe any other law of the land when properly presented for interpretation, and while the courts will give due consideration to the construction placed upon a treaty by the executive or diplomatic branches of the government, yet upon the courts is placed the duty of acting independently, and to accept full responsibility in determining the construction that is to be given to the treaties. And further, inasmuch as the treaty is by the constitution made a law of this land, the construction placed upon some of its provisions by the departments of the foreign country with whom the treaty is made, executive, legislative or judicial, are not controlling. The fact that our courts' interpretation of the true meaning of such provisions may not be acquiesced in by the foreign government is of no consequence when the question is one of enforcing such treaty provisions in this country, and over a person who is within its jurisdiction.

508 The word "persons" given its ordinary meaning is sufficiently comprehensive to embrace citizens. The fact that in the countries composing continental Europe a less inclusive meaning has been attributed, one that conforms more to their idea of national policy, will not be accepted as a conclusive canon of construction of words used in international compacts, when other countries no less significant in national importance and in international relations, have adopted the more comprehensive meaning, and the one in accord with its etymology. In thirty-one of the thirty-six treaties made by this government with foreign countries, in which the word "persons" is used, there have been inserted specific clauses expressly excluding from the operation of such treaties, the citizens and subjects of such countries. This to my mind is a clear indication that among the greater number of sovereignties constituting the family of nations, the word "persons" used generally and without qualification, includes the citizens and subjects of the respective contracting nations, and that the international canon of construction asserted for the contrary interpretation, does not exist.

The construction that I give to such word in the treaty now under review, is that it includes citizens and subjects respectively of the contracting parties. Charlton, therefore, being embraced within what is now determined to be the proper construction of this treaty provision, the remaining question is whether, in view of the persistent refusal of the Kingdom of Italy to give this provision such construction, and its withholding from us when demanded,

509 its subjects fugitive from our justice, the treaty is abrogated. In that behalf, it is said that the refusal by Italy to surrender its subjects, is such a breach of a reciprocal duty as to prevent the American government from surrendering its citizens.

It seems to me that that proceeds upon a false reasoning. In the case of an ordinary contract, it is not held that because one of the parties violates its terms, the other may not insist upon its being maintained. He has the option of considering the contract at an end, and taking such steps to enforce his rights as he deems best. That is also the option of the United States government. But which department of the government? Manifestly, the political departments—congress or the treaty-making power; possibly the executive power within certain limitations—assuredly not the judiciary. How can it be said that a court may declare a treaty made between the United States and a foreign sovereignty, abrogated, when the political departments of the government are treating it as subsisting. That, it will be observed, is not a question of construction, but of the existence of the agreement. The argument in that behalf, as I understand petitioner's counsel, is that by the conduct of the Italian Kingdom, based on its construction of the word "persons," the convention was at an end. It seems to me that the logic of counsel's argument forces him to that conclusion. If the act of the Italian government does not put it at an end, it is not at an end, because neither congress nor the treaty making power of the United States has so considered it.

In that behalf, it is also said that the executive department has not the power to exercise an option. That may be true, but so far as this question is concerned, it is unimportant.

510 If it has not the power to affirm, neither has it the power to disaffirm, and the treaty continues in the absence of congressional action, or action by the treaty-making power. The American government has dealt with the treaty as subsisting; it has honored the requisition of the Italian government for the surrender of its citizens; and the court has not the power to go behind that act and say that the treaty has been ended.

A further contention is that under the treaty provisions plus our statute, Charlton's surrender has not been demanded within the time fixed by the treaty—forty days from the time of the arrest. It appears that Charlton was arrested not pursuant to a formal requisition of the Italian government, but upon the complaint of the Vice-Consul, Italy's representative in this country.

A reference to the statutory requisites for the extradition of fugitives from justice is necessary here for a proper understanding of what is meant by a formal demand. These are to be found in the Act of August 12, 1848, 9 Stat. 302; Secs. 5270-77, Rev. Stat.; article 5 of the treaty between the United States and Italy of 1868, 15 Stat. 629; and Article 2 of the Supplemental Treaty of 1884, 24 Stat. 1002. These are to be read and construed together; the treaty provisions being the later, of course, control when the two are irreconcilable.

Section 5270 is in force wherever there is a treaty existing, and authorizes the committing magistrate, upon complaint made under oath, to cause to be brought before him, any person charged with having committed an extraditable crime in a foreign country, and to hear and consider the evidence of criminality  
511 that may be brought against him.

By article 8 of the original treaty, the arrest is made upon the warrant of the executive. By article 2 of the Supplemental treaty, an arrest is authorized by the magistrate upon the exhibition to him of a certificate from the secretary of State, attesting that a requisition has been made by the foreign government to secure the preliminary arrest of the person charged with crime, and on a complaint under oath attesting the commission of the crime.

On the hearing, by section 5270, if the magistrate deems the evidence sufficient to sustain the charge under the treaty, he is to certify his finding, together with a copy of the testimony to the Secretary of State, that a warrant may issue upon the requisition of the foreign government for the surrender of such person, according to the treaty stipulations, and commit the accused to await such surrender.

By Article 2 of the Supplemental treaty it is provided that the accused may from time to time, be remanded to prison until a formal demand for his extradition shall be made and supported by evidence, as above provided. This article also provides that if the requisition with the documents provided for be not made by the demanding government within forty days from the arrest of the accused, he shall be set at liberty.

It will be noted that by the Statute which is in force in the case of all treaties an alleged fugitive from justice may be arrested upon complaint, regardless of whether a requisition or demand has been made on this government; that only the surrender of the accused is dependent upon the requisition of such foreign government; and that the warrant for such surrender is issued by the Secretary of State.

The committing magistrate has no concern with what transpired between the foreign government and our own, preceding or subsequent to the issuing of such warrant or certificate. The duty of the committing magistrate is confined to determining, first, whether such warrant or certificate has been issued; second, whether the offense charged against the accused is extraditable under the treaty; third, whether the person brought before him is the one accused of such crime; and, fourth, whether there is a probable cause for holding the accused for trial; the evidence in that respect to be such as according to the law of the State in which the accused is apprehended, would be sufficient to commit him for trial.

In this case, the certificate from the Secretary of State was exhibited to the magistrate between Charlton's arrest and the final hearing. This, under the authorities, is sufficient. It is contended, however, that in addition to the requisition from the foreign government, which properly should precede the issue of this certificate—the mandate to the committing magistrate—the Italian government must make a formal demand before the person apprehended may be removed from the country of his asylum. It seems to me that such a construction is not tenable. Certainly, if a fugitive from another country's justice may be apprehended upon a written complaint under oath, demand for his extradition should be made by the government whose justice has been outraged, before such person should be surrendered. But it is going too far to say that if the

demanding government has at some time either preceding the accused's arrest, or before the expiration of the forty days, formally placed before our government a demand for his extradition, and upon which the Secretary of State's mandate issued, that such foreign government should be again required to make a demand. But assuming that a formal demand different from, and in addition to, the requisition upon which the mandate issued, is required, even such a demand has been made in this case. The Secretary of State has twice certified to this court a communication received by his department from the representatives of the Italian government, and which, as I read it, is a formal demand made under this treaty. True the word used is not "demand." It is "request." But that does not change the effect or significance of the act. Some strenuous persons might use the word "demand," when they mean "request"; and others with more tact or diplomacy will use the word "request," when they mean "demand." But the result is the same. It is a distinct declaration from the foreign government that a certain person is desired, and it amounts, in legal parlance, to a demand. Nor have I any concern with the fact that this emanates from a government that has been persistent in its refusal to surrender its own subjects upon like request or demand. The request or demand was made. It is based upon this treaty. And whatever construction Italy placed upon the word "persons" it reached our department as a demand under that treaty. Our Government honored it. It is a part of the records in the Secretary of State's office; it may not actually have been recorded in the books, and may not even appear in the index. But it is there; and I can see nothing in the statute or the treaty that requires anything more formal than the fact of making the demand.

The result is that the writ of habeas corpus must be dismissed.

514 United States Circuit Court, District of New Jersey. In re Porter Charlton. On Habeas Corpus. Oral Statement by Court at end of Argument. John Rellstab, District Judge. Filed January 23, 1911. H. D. Oliphant, Clerk.

515 At a Stated Term of the United States Circuit Court for the District of New Jersey, in the Third Circuit, Held at the United States Court Room, in the Capitol Building, in the City of Trenton, on the 23rd Day of January, in the Year 1911.

Present: Hon. John Rellstab, J.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

The above matter having come on to be heard on the petition of Paul Charlton, as next friend of Porter Charlton verified the 9th

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day of December, 1910, and upon the writs of habeas corpus and certiorari thereupon issued, the said writ of habeas corpus being a writ dated December 10, 1910, directed to James J. Kelly, Sheriff of Hudson County, State of New Jersey, United States of America, commanding the production of the body of Porter Charlton, and the said writ of certiorari being directed to the Hon. John A. Blair, a Judge of the Court of New Jersey sitting as an examining magis-

trate under the United States Revised Statutes, and to the  
516 Hon. P. C. KNOX, Secretary of State of the United States of America, commanding that they return the proceedings in the above matter before the magistrate, and on the returns to the said writs of habeas corpus and certiorari made by the said Sheriff and the said Hon. John A. Blair, Judge of the state court, sitting as a committing magistrate under the United States Revised Statutes, and the Hon. P. C. Knox Secretary of State, and thereupon such proceedings being had herein, as is recited and set forth in the order entered herein on the 30th day of December, 1910, a further writ of certiorari issued on the motion of Pierre P. Garven, Esq., of counsel for the Hon. Gustave Di Rosa, Vice Consul of the Kingdom of Italy for the City of New York directed to the Honorable, The Secretary of State of the United States, requiring him to certify, as set forth in said writ, the following matters, among others, namely: a true copy of the demand of the Kingdom of Italy upon the United States Government for the extradition of Porter Charlton, dated on or about July 30th last, and the date of the filing of the same in the office of the Secretary of State, as recited in the said order of 30th day of December, 1910, and thereafter such proceedings having taken place herein as are set forth in the order of the 4th day of January, 1911, and on the return to the said further writ of certiorari and the return to the said order of January 4, 1911, made by the Hon. P. C. Knox, Secretary of State, and said matter having been adjourned, on consent of counsel for the petitioner, to this date, and after hearing R. Floyd Clarke of counsel for the petitioner, in support of the said writs of habeas corpus and certiorari, and of an application for the discharge of the said Porter Charlton  
517 from custody, and said Porter Charlton having been produced

before this court by the said Sheriff in obedience to said writ of habeas corpus, and after hearing Pierre P. Garven, Esq., of counsel for the Hon. Gustave Di Rosa, Vice Consul of the Kingdom of Italy for the City of New York, in opposition to said application and in support of an application to remand said Porter Charlton to custody, and due deliberation having been had, it is

Ordered that the said writ of habeas corpus hitherto obtained by the petitioner herein on his petition verified the 9th day of December, 1910, and bearing date respectively December 10, 1910, be and the same hereby is discharged and dismissed, and the prisoner is remanded to the custody of James J. Kelly, Sheriff of Hudson County, State of New Jersey, there to be held until delivered pursuant to a warrant of surrender heretofore issued by the Secretary of State of the United States after ten days from the date hereof:

And it is further ordered that proceedings on such warrant of surrender be stayed for such ten days from the date hereof and the



prisoner have liberty, pending such ten days, to make such application on appeal as petitioner may be advised to make to this court, or to a justice thereof, or to a justice of the Supreme Court of the United States, pursuant to the 34th Rule of the Supreme Court of the United States.

Dated Jan. 23d, 1911.

JOHN RELLSTAB, *Judge.*

518 17—105. 6082. United States Circuit Court for the District of New Jersey. In the Matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original.) Final order dismissing writ of habeas corpus and remanding prisoner, with stay of ten days pending application for appeal. R. Floyd Clarke, Att'y for the petitioner, 37 Wall St., New York City. Filed January 23, 1911. H. D. Oliphant, Clerk.

519 Circuit Court of the United States for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

And now comes the petitioner, Paul Charlton, as next friend of Porter Charlton, by R. Floyd Clarke, his attorney, in connection with his petition of appeal from the order herein dated the 23rd day of January, 1911, dismissing the writs of habeas corpus and certiorari herein, and makes and files the following assignments of error:

The Court erred:

1st. In dismissing the writs of habeas corpus and certiorari, and remanding the said Porter Charlton.

2nd. In holding that the said Porter Charlton is lawfully held in custody.

3rd. In holding that, in view of the facts and circumstances set up in the said record, there is at the present time any treaty existing between the United States of America and the Kingdom of Italy requiring the surrender from America to Italy of a citizen of America committing crime in Italy and fleeing to and obtaining asylum in the United States of America.

4th. In holding that, under the facts and circumstances set up in the record, the treaty between the United States of America and the Kingdom of Italy included the extradition of persons who are citizens respectively of said countries, and who, as citizens of one country, for instance the United States, have committed crime in the other country, for instance Italy, and have thence fled to and obtained asylum in the United States.

5th. In holding that the provisions of the treaty between the



United States of America and the Kingdom of Italy, under the circumstances and facts set up in the said record, properly construed establish a binding obligation on the part of the United States of America to surrender an American citizen committing crime in Italy and fleeing to the United States of America for asylum under said treaty to the Italian Government on the demand of said government.

6th. In holding that, on the hearing before the said Magistrate, there was legal proof of the commitment of any crime, or any proof on which reasonable cause could be predicated of the commission of any crime in that certain documents which were admitted against the objection and protest of the petitioner and of petitioner's son were not and are not duly authenticated under the statutes in such case made and provided so as to be entitled to be used in evidence in the proceeding aforesaid, and thereby the said court had no jurisdiction under the statute and treaty in such case made and provided.

7th. In holding that, at the hearing of the matter of extradition of Porter Charlton before the Judge of the Court of Oyer and Terminer, of Hudson County, New Jersey, sitting as a Federal Examining Magistrate under acts of Congress, certain witnesses, qualified by age, knowledge and experience, physically present in Court, who were offered to be sworn on behalf of the accused for the purpose of proving that the accused was insane on the date when the alleged crime was alleged to have been committed, and on the date of said hearing, to wit, September 21, 1910, were properly refused to be allowed to be sworn, and any such evidence as to the insanity of the accused at the time of the commission of the alleged crime or at the date of the hearing was properly refused to be introduced.

The full substance of such evidence so rejected by the Court and to which exception was taken as aforesaid, being as follows:

Mr. EDWARDS, of counsel for the prisoner:

"In addition to this, we propose to show, as a reason why the extradition should not be granted, that on the day of the date of the commission of the crime in Italy, the prisoner, Porter Charlton was of unsound mind to such extent that he was unable to distinguish between the right and wrong of the deed for which he was committed; in other words, that under our law, he was insane and continued in that condition of mind up to the time of his arrest. And we propose to give expert evidence on that subject, and other evidence in support of the expert evidence as to his previous life, and physical antecedents and ancestry.

We submit that we should put in the documentary evidence last and the insanity evidence first, as the witnesses are here.

We call Paul Charlton.

(Objected to.)

Mr. EDWARDS: We offer to prove by the testimony of Mr. Paul Charlton, the father of defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime, in the month of June, in Italy, this

defendant was of unsound mind. That at the time of the commission of the alleged crime, he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit: that at the time of the doing of the act complained of, this defendant was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

Mr. GARVEN: It is quite evident that counsel has admitted the commission of the crime by Porter Charlton.

We object to this witness testifying to the insanity of the defendant, on the ground that your Honor is sitting merely as a committing magistrate, and under the law of this State, a committing magistrate will not allow the defense to go into the case on a preliminary hearing on a complaint, except that the defendant might make a statement, not under oath.

And secondly, that it is inadmissible to plead insanity in this proceeding.

And on those grounds, we object to the evidence."

\* \* \* \* \*

Thereupon, while said court was still sitting upon said day in the hearing of the above matter, Mr. Edwards, of counsel for the defendant, called a witness on behalf of the defendant to testify

523 as to certain facts material to the defense in said proceeding, said witness being competent by age and knowledge to give such testimony, and being then physically present in said court, and being presented at the bar of said court to be sworn, for the purpose of giving such testimony; and, before such witness was sworn, as above, an objection having been interposed on the part of the State to the introduction of any evidence of the insanity of the defendant:

And counsel for the defendant having stated orally, at the bar of the Court, that he proposed to offer by the testimony of the witness then at the bar of the Court, and offered to be sworn, and by the testimony of other witnesses then physically present in the Court, competent by age, experience and knowledge and ready to be sworn and to testify in this proceeding, and by this testimony to prove that the defendant, at and before the time of the offense alleged to have been committed by the defendant was committed, and at the time of the arrest of the defendant in Hudson County, New Jersey, to wit; on June 23rd, 1910, and at the time said offer was made, to wit; on September 21st, 1910, the said defendant was, and is, insane, and irresponsible for his acts, and further offered to prove by the testimony of Paul Charlton, the father of the defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime in the month of June, in Italy, this defendant was of unsound mind, that at the time of the commission of the alleged crime he did not have the mental ability to discrimi-

524       nate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit; that at the time of the doing of the act complained of, this defendant was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

And the Court, at said place and upon said date, having duly considered said offer of testimony on behalf of the defendant, and the objection to the reception thereof, interposed on behalf of the State, having sustained the objection, and declined to permit the introduction thereof, or the production and swearing of said witnesses on behalf of the defendant as to such facts or any of them; to which action and ruling of the court, due exception was made by counsel on behalf of the defendant, and such exception having been duly noted on the records of the court, allowed and sealed.

JOHN A. BLAIR, *Judge*. [L. S.]

And the Court having granted, in open court, permission for counsel for defendant to present a statement and schedule of the facts so offered to be proven, on behalf of defendant, by said witnesses who were then physically present in Court, and competent, ready and willing to testify thereto, in compliance with said permission, there is submitted for insertion in the records of this court, in the hearing of this case, a statement and schedule of the said facts so offered to be testified to, introduced and proven on behalf of the defendant, as follows:

525       That the defendant was born, and now is, an American citizen; that he was born at Omaha, Nebraska, within the United States, on September 21st, 1888; that at the time of his birth, both his father and his mother were American citizens; as a child, he was normal, physically and mentally, and although physically very active and adroit, apt and skilful as an athlete, he was never physically robust or strong.

As a child, his temper was usually good; he was amiable, gentle, fond of company, of his family and his companions, and was well liked by everyone. From his early childhood, he was subject to fits of extreme rage, upon provocation, and infrequently. On one occasion, when he was of the age of fourteen years, the horse he was riding took fright, and ran away with him, and when he brought the horse in, both horse and rider were in a state of complete exhaustion—the horse from overriding and from laceration of his mouth by a severe bit, and of his sides and flanks from severe and cruel spurring. The boy was in hysterical rage, trembling violently, and crying, and begging to be allowed to take further vengeance upon the horse, because he had been unruly, and he had to be taken from him by force. Later, during his life in boarding school, on occasions of athletic contests, on several occasions he became violently enraged, and required to be restrained by force from commit-

ting reprisals on his opponents. He had, during all his life, spent much time in outdoor sports and exercise, until he came to New York in December, 1908, and took a place in a bank, where his duties soon became so onerous as to require (in his judgment) constant application at a desk from 9 A. M. to 6 P. M. and frequently until midnight, and this usually for the whole seven days of the week. In September, 1909, his associates and family began to notice a radical change in him. He became very thin, his face was 526 grey and drawn, his temper became uncertain and he was resentful of suggestion or control to the verge of extreme rudeness; generally, the change from evenness and courtesy was so pronounced as to be noticed by everyone with whom he came in contact. This change, in those regards, became more and more pronounced, until he was insubordinate to the directions of his employers, and repudiated the suggestion or control of his father, or the advice of his brother and friends. He became solitary, morose, uncommunicative. When he left his work, he would lock himself alone in his lodgings, and would read works of the imagination and poetry. He ceased to visit his friends and refused offers and invitations for entertainment in their company.

Early in the year 1910, he developed a persistent, hacking cough, expectorated almost constantly, his shoulders were drawn in, he was stooped and emaciated. He ridiculed, with resentment, the endeavors of his family to induce him to take medical advice, and to take exercise in the open air, and reduce his hours of work. His condition became alarmingly worse between his father's visits to him on February 1st and March 6th, 1910; on the latter date, he was in a state approaching physical collapse, his breathing was oppressed, and his sputum tinged with blood. He was put to bed, and consented to consult a physician the next day. After examination it was found from his sputum and an X-ray photograph, that he was suffering from incipient tuberculosis, and he was advised that life in the open air, with practically hospital surroundings, would be necessary to save his life. Arrangements were at once made for the termination of his employment on April 1, and permission had been obtained 527 for his admission to the tuberculosis hospital of the United States Army, at Ft. Bayard, New Mexico, to which he gave ready assent.

Coming to New York to see him, to make final arrangements, his father met him at the 23rd Street ferry, and told him that he was in a great hurry to keep a dinner engagement. On the way from the ferry in a cab, he told his father that he had been privately married, on March 12th, 1910, to a woman slightly older than he, who had been forced to divorce her husband, but who was the brightest, prettiest and most charming lady in the world.

Instead of driving to the place of his father's engagement, the cab was driven to "The Woodward Annex," an apartment hotel at 55th Street and Broadway, where the defendant and his wife, Mary Scott Castle Charlton, were then living. Mrs. Charlton, was apparently, at least twice the age of her husband, was vivacious and had the appearance of intense vitality, in marked contrast to her husband, who

was stooped, with drawn face, a constant irritating cough, and was noticeably under the domination of his wife. After a short interview, the father proceeded to his engagement, and returned to the hotel about midnight.

At the interview which followed, the father made respectful inquiry of the wife in relation to her family, her life and career, including her former marriage, which had been dissolved by divorce, and also as to the resources of the husband and wife, the husband having no private means, except as furnished by his father,—and being out of employment.

These natural and necessary questions were resented by the wife, and the interview terminated in about half an hour in her withdrawal with her husband, in a highly hysterical condition. Offers of assistance by the father were refused in violent words by the husband and wife.

528 Similar offers were refused on the following morning, as were invitations by telephone from the father to the wife and husband to lunch and dine with him on that day.

Mr. and Mrs. Charlton did, however, dine on the evening of March 29, 1910, at the Hotel Lafayette, 9th Street and University Place, with the father and a gentleman friend, at which time the wife drank without moderation, white wine, and after dinner, furnished at her request, two large goblets of "dropped absinthe" in ice.

The father did not again see Mr. and Mrs. Charlton, or either of them, prior to their sailing from New York for Genoa on the S. S. "Duca D'Aosta," on Saturday, April 16, 1910.

The father did, however, receive from his son, on or about April 6, 1910, a letter so full of foulness and abuse that the father destroyed it unread, except a glance through it to see its purport and phraseology.

The latter were entirely unlike any diction, oral or written, that the son had ever been known to use; he had hitherto been a purist in the use of language, and extremely refined in both conversation and correspondence, while the letter was full of phrases of the gutter, such as would be used by the most abandoned person. Aside from the abuse of the father, the letter contained the most extravagant eulogies of the wife.

A similar letter, equally strange and foul, was received by the father from the son in Italy about May 16th, 1910, which was likewise destroyed unread except for a glance to learn its purport and phraseology, which, like that of the former letter, was abusive, foul,

529 insulting and utterly, radically different in those qualities, and in its rambling incoherence, from anything his father had ever known him to speak or write. Both the letters bore convincing, internal evidence of having been dictated rather than originated by the writer.

He wrote two similar letters to one of his brothers—one before he sailed for Italy, and one on or about May 18th, 1910, both full of abuse of his family and eulogies of his wife. Both these letters were destroyed after being glanced over to see if they contained any

important statement as to his health or plans, which neither of them did.

These were the only communications received by his family after he sailed for Italy and up — the day of his arrest at Hoboken on June 23rd, 1910. His father saw him at Police Headquarters, Hoboken, N. J., on the night of his arrest; when there were also present—Mr. Hayes, Chief of Police, several officers; Recorder McGovern, by whom he had been committed; Dr. William J. Arlitz, the police surgeon, R. Floyd Clarke, Esq're, his counsel, and Robert Charlton, his brother.

On this occasion, he was in a state of hysterical exaltation; he refused to greet or speak to his father; had no apparent appreciation of the gravity or seriousness of his situation; was incoherent in his statements and talked freely in a rambling, disconnected manner to all the persons present, and was palpably, to any observer, out of sound mind.

When he arrived at the dock in Hoboken, he left the steamer carrying two suit cases, one of which was marked with the initials "P. C.," and submitted them to the examination of the customs officials, although they contained toilet articles and wearing apparel marked with his name or initials, letters addressed to him and visiting cards bearing his name. His demeanor at the time of his arrest, preliminary examination, etc., was such to convince the police surgeon that he was demented.

#### *Family History of Porter Charlton.*

1. The maternal grandmother of defendant died at the age of between 35 and 40 years, of chronic alcoholism.
2. The brother of the foregoing (No. 1) was a paranoiac for years before his death and died in that condition.
3. The sister of the foregoing (Nos. 1 & 2) had a daughter afflicted with epilepsy, who died in epileptiform convulsions at the age of about 32.
4. The maternal uncle of the defendant, now 51 years old, is of abominable and brutal nature; was educated as a chemist, became a pharmacist; wasted his estate on a low connection with a woman much older than himself; contracted drug habits; and has lived an eccentric and immoral life since the age of 21 years; entirely cut off from associates of his own class.
5. A near relative of his mother's blood, now living, has had periodic exposures of attacks of epilepsy for many years.
6. A younger brother of defendant at the age of 15 years, accidentally shot and killed a playmate, to whom he was devotedly attached, but after his first paroxysm of grief—within three days—seemed to forget the accident; never referred to it; has since gone about his daily life as if it had not happened, and, so, far as can be observed, has remained indifferent.



*Some Medical History of Mary Scott Castle Charlton.*

531 1. Within three years was confined in an institution in the City of New York, suffering from erotic insanity—uncontrollable desire for the society of men.

2. Within two years last past, and up to the time of her departure for Italy, was under the treatment of two physicians of the City of New York for alcoholism and uncontrollable, hysterical outbursts of rage. On learning of her proposed marriage to defendant, both physicians endeavored to have disclosure of these facts made to defendant, but were unsuccessful.

The foregoing is important and material, as explaining the physical and mental condition of the defendant as disclosed to the alienists who have had him under observation since his arrest.

*Opinion of Physicians—Experts in Mental Diseases.*

Defendant has been under the observation of Dr. William J. Arlitz, Hoboken, New Jersey, from the hour of his arrest on June 23, 1910; and of Drs. Allan McLane Hamilton and Edward D. Fisher since June 24, 1910.

They have, singly and together, made frequent and exhaustive examination of the mental and physical condition of the defendant from the above dates until the present, and they are unanimously and strongly of the opinion that, at the date of the crime alleged to have been committed by the defendant, and at the date of his arrest in the United States, and at the present date, the defendant was and is, suffering from an exhaustive psychosis due to sexual

532 excesses; that his moral sense is pathologically defective; that he is of unsound mind, and liable to attacks of impulsive violence, which explosions are beyond his control and are due to hysterical stigmata and epileptiform seizures, during which he was not and is not responsible; that his whole condition shows a degree of weakmindedness, disregard for his personal safety and liability to violent explosion at any time, which is to be looked for in a person of his constitutional mental weakness.

The said expert physicians and alienists who have examined the defendant since he has been in custody, will depose that in their opinion this defendant, at the time of the commission of this alleged crime, in the month of June, in Italy, was of unsound mind, and that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and that in their opinion, conforming with the tests of responsibility laid down by our courts, this defendant at the time of the doing of the act complained of, was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of the act, and that this condition existed some time previous to the commission of the alleged crime and continued up to and including the time when he was arrested.

These physicians recommend that he should be taken to a hospital



for the insane and there kept indefinitely, as he is at any time likely to be a menace to society.

The defendant, by his counsel, offers to prove the facts, and each of them, set forth in the preceding schedule or statement, by the competent, relevant and material testimony of witnesses now  
 533 physically present in court, and qualified by age, knowledge and experience to testify to the same, and each of said facts, and to the results and conclusions and opinion necessarily and legally following therefrom.

Thereupon the Court ruled:

The COURT: I have reached the conclusion, on the subject of insanity, as a defense in this matter, that I will not hear it. I do not think we ought to go into the subject of the insanity of the defendant, and therefore overrule the offer of the defense.

Exception taken by defendant, and allowed and sealed.

JOHN A. BLAIR, *Judge*. [L. s.]"

8th. In holding that, although it was proved that the said Porter Charlton was, at and prior to the time of said alleged crime and said hearing, a citizen of the United States of America, and although the provisions of the Constitution of the United States, the statutes and treaties were presented, and although the diplomatic correspondence between the United States of America and Italy in regard to said treaty was presented and proved, including the original contention of this country that the word "persons" in said treaty meant citizens, of the asylum country, and the consistent contention of Italy that the word "persons" in the treaty did not include citizens of the asylum country, and although it was proved that on January 1, 1890, after enactment by the Parliament of Italy, there  
 534 was put into effect within the Kingdom of Italy, by Royal decree of the King of Italy, a Penal Code for the Kingdom of Italy, Article 9 of which provided that "The extradition of a citizen is forbidden," the same being subsequent to the date of the treaties of extradition between the United States and Italy, and also there was proof that the United States Government had, in or about 1899, abandoned its former contention by refusing, on the request of Governors of States of America on the Secretary of State to demand extradition from the Kingdom of Italy, to even present the request for the same to the Italian Government, and although the twenty-two years elapsed since the beginning of said controversy and in the eleven years after the refusal of the Secretary of State of America to even request Italy to extradite an Italian citizen under said treaties many congresses had been elected, served and gone out of office, and many secretaries of states and two or three presidents and no action had been taken thereunder to enforce the provisions of said treaty as originally construed and as afterwards abandoned, the said treaties are still in force sufficient to make it obligatory upon the officers of the government, on request of the Kingdom of Italy, to surrender a citizen of the United States in extradition under said treaties.

9th. In holding that, although no documents were presented

either to the Department of State of the United States or to the Court of Oyer and Terminer of Hudson County, New Jersey, sitting under the provisions of the Acts of Congress in that behalf made and provided as a Federal Examining Magistrate in said extradition matter as aforesaid, within forty days as provided in said extradition convention and the addition thereto, and the said documents when presented on August 11, 1910, more than forty days after the arrest of the said Porter Charlton as aforesaid, and were then  
535 neither accompanied by the formal demand of the Government of Italy for the extradition of Porter Charlton, nor were the documents so presented authenticated, identified and offered in the manner provided by said convention and addition thereto and the statutes in such case made and provided, the said documents when and as presented after the forty days were sufficient for the purposes of prosecution under said treaty and to hold the said prisoner thereon.

10th. In holding, although no formal demand for the extradition of said Porter Charlton was presented either to the Department of State of the United States or to the Court of Oyer and Terminer of Hudson County, New Jersey, sitting under the provisions of the Acts of Congress in that behalf made and provided as a Federal Examining Magistrate in said extradition matter as aforesaid, within forty days after the arrest of the said Porter Charlton as provided in said Extradition Convention and the addition thereto, and in face of objection made thereto on that ground that the said extradition proceedings were valid and effectual for any purpose in view of such defects under the treaty.

11th. In holding that, although the requisition for the surrender of the said Porter Charlton alleged to be a fugitive from justice, made by the Kingdom of Italy as aforesaid, on which the certificate or mandate of the Secretary of State in this proceeding was issued, was a requisition without any accompanying documents as provided in the second paragraph of Article V as amended and supplemented by the 1884 Convention additional to the Extradition Convention between the United States and Italy of 1868, and although the formal demand for the extradition of said Porter Charlton was not  
536 thereafter presented either to the Department of State or to the Court of Oyer & Terminer sitting as aforesaid within forty days after the arrest of said Porter Charlton, as provided in said extradition convention, and objection was taken thereto in due form, that the said proceedings were in any way valid or effectual to hold the said prisoner.

12th. In holding that, in view of the facts and circumstances set up in said record, there was power or authority in the said Magistrate to hold the said prisoner, and in the said Secretary of State to affirm the said holding and issue his warrant as aforesaid in said proceedings under the due process of law, and other constitutional limitations for the protection of American citizens."

13th. In holding that the treaties between the United States and the Kingdom of Italy had not become, by the acquiescence of the United States Government in the contentions of Italy, a treaty which did not include citizens of the asylum countries.

14th. In holding that the treaties of extradition between the United States of America and Italy had not become, by the action of the Italian Government, non-obligatory upon the United States Government, and thereby created an option which could only be exercised by Congress or the treaty-making power of the United States and not by an executive officer.

15th. In holding that the treaties of extradition between the United States and Italy had not, by reason of the breach and denunciation thereof by Italy, as to their inclusion of citizens of the asylum country, become no longer obligatory on the United States Government either under international or municipal law, and that the option thus arising could be exercised by any other power under our constitutional limitations than the Congress or treaty

537 making power itself.

16th. In holding that the acts of the Italian Government in breaking and denouncing the treaties of extradition between the two countries, so far as the same could be construed to effect citizens of the asylum country, and the subsequent action of the United States Government in accepting performance of the treaty from the Italian Government as including all other persons excepting citizens of the asylum country, were not a waiver and estoppel on this government to claim that the true construction of the treaty was any other than the Italian construction of the treaty, as against a citizen of this country claiming rights as such under the Constitutional Limitations.

17th. In holding that the true construction and application of treaties of extradition between the United States of America and Italy were that they included citizens of the asylum countries when as a matter of fact they do not include citizens of the asylum country under the doctrines of international and public law.

18th. In holding that the treaties of extradition between the United States and Italy, when broken and denounced by Italy, could still exist as an obligatory law under the constitution of the United States as against the constitutional rights of a citizen under the constitutional limitations when, by reason of both the international and municipal law applicable to the subject matter, the said treaties, both as contracts and treaties, have become optional in their operation on the part of the United States Government and that the right

538 to exercise such option as against the constitutional limitations protecting the rights of citizens could be dependent on no other power than the act of Congress or treaty-making power itself.

19th. In holding that by the diplomatic construction of the State Department of the United States of America, a covenant in a treaty of extradition between the United States of America expressed in identical language for the correlative covenant of the two governments could mean one obligation on the part of the Italian Government and another obligation on the part of the United States Government.

20th. In holding that, on the hearing before the Magistrate in extradition proceedings, evidence of insanity at the time of the hearing was immaterial, irrelevant and incompetent and should be ex-

cluded, and the full substance of the evidence so rejected by the court and to which exception was taken as aforesaid is set forth in the 7th assignment of errors herein.

21st. In holding that, on the hearing before the magistrate, evidence of insanity at the time of the crime is incompetent, immaterial and irrelevant, and should be excluded, and the full substance of the evidence so rejected by the court and to which exception was taken as aforesaid is set forth in the 7th assignment of errors herein.

22nd. In holding that, under the provisions of the treaties between the United States of America and the Kingdom of Italy, "persons" means "citizens" of the asylum country.

23rd. In holding that, in spite of Italy's admitted breach of the covenant to extradite citizens of the asylum country, so far  
539 as concerns her own citizens and the option thence resulting in the Government of the United States to affirm or disaffirm the correlative obligation under the reciprocal covenant, an executive officer of the United States of America has power to deport a citizen in face of the constitutional limitations requiring due process of law.

24th. In holding that, on Italy's breach of the reciprocal covenant to surrender citizens of the asylum country, an executive officer of the Government of the United States has no power to affirm and likewise has no power to disaffirm the treaty, and hence the treaty is binding on him, and in refusing to hold that in refusing to extradite citizens of the asylum country the executive of the United States Government has, except where constitutional limitations prohibit, as full powers as the sovereignty, and that the power to disaffirm an action taken thereunder offends no constitutional limitations, while the power to affirm an action taken thereunder in deporting a citizen of the United States offends the prohibition contained in the due process of law clause of the limitations of the constitution as much as the power to affirm by going to war and action taken thereunder or the power to affirm by making a treaty of arbitration or making a treaty thereunder offends against the limitations of the constitution in regard to ward and treaty making powers.

25th. In holding that the option of considering the treaty at an end and taking such steps to enforce the rights of the Government thereunder as he deems best arising from Italy's breach of the covenant to extradite citizens of the asylum country can be exercised by an executive officer of the United States Government in view of the constitutional limitations protecting the rights of a citizen—  
540 the due process of law clause.

26th. In holding that the fact that the executive of the United States Government had dealt with the treaty as an existing one in spite of the breach on the part of Italy of the covenant to extradite citizens of the asylum country is, in a case of this character, where the right of an American citizen to protection under the constitutional limitation as against the arbitrary exercise of executive power in attempting to deport him as a citizen of the asylum country on the request of Italy, a political or diplomatic question which the court has no power to go behind and no power to controvert and is without authority in the premises.

27th. In holding that the formal demand for the extradition of Charlton has been made within the forty days required by the treaty.

28th. In holding that the formal demand for the extradition of Charlton, called for by the treaty, has been sufficiently complied with in the presentation to the American Government of the alleged formal demand bearing date July 28th, 1910, Respondent's Exhibit 1 of January 23, 1911, set forth in full in assignment of errors herein numbered 33rd.

29th. In holding that the committing magistrate has no concern with what transpired between the foreign government and our own preceding or subsequent to the issuing of the warrant of surrender or the certificate of the Secretary of State that a requisition has been requested, so far as concerns the compliance of the foreign government with the provisions of the treaty.

30th. In holding that the provisions of the treaty do not require, in addition to the original request for extradition, a further formal demand for the extradition of the prisoner within the forty days as specified in the treaty different from and in addition to the requisition originally requested.

31. In holding that the fact that the alleged formal demand in this case emanates from the Italian Government which has been persistent and consistent in its refusal to surrender its own subjects under the reciprocal covenant in the treaty, alleged by America to be binding against it, is of no importance in this case as affecting the validity of such demand.

32nd. In holding that such demand, in view of the phraseology in which it is couched and its reference to the preceding communications, which are thus made a part of it, is in any sense a proper or legal demand within the fair meaning and terms of the treaty of extradition.

33rd. In allowing, on the hearing of said habeas corpus and certiorari herein, the production of any evidence other than the record before the magistrate as certified to the court by the Secretary of State and by the magistrate on return to the writs of certiorari,—the full substance of the evidence so admitted over the objection and exception of the petitioner being the following:

*Hearing January 23, 1911.*

R. Floyd Clarke, Esq., of New York City, for the petitioner.

Pierre P. Garven, Esq., Prosecutor of Hudson County, for the Italian Government.

542 "MR. CLARKE: I move on behalf of the petitioner, that, as

I understand the law and the practice of habeas corpus in an extradition case, the only record before this court for consideration is the record as it existed before Judge Blair, and the only record which is before this court is the record which was certified by Judge Blair to the Secretary of State's office, and as it has been certified by the Secretary of State's office to this court by the certiorari.

MR. GARVEN: The petition having set forth that no documents were presented to the Department of State of the United States, and

the prayer of the petition calling for all records of all proceedings before the Secretary of State as well as the Committing Magistrate, and that upon an order granted upon motion made by petitioner's counsel for correspondence between the Italian Government and this Government, and between Mr. Floyd Clarke, counsel for petitioner, and the Secretary of State, and those records being before the court at this time, at its request, the Italian Government objects to these being taken from the record.

MR. CLARKE: In answer to the learned counsel, whatever the petition may set forth, the scope is contained simply and solely in the certiorari itself, which upon its face calls upon the Hon. Secretary and the Hon. John A. Blair to certify a true transcript of all proceedings taken by said magistrate against Porter Charlton under and pursuant to the warrant, and also of all other proceedings taken before said magistrate in this matter.

In regard to the further certiorari obtained by the Italian Government, attention is called to the fact that petitioner's Counsel objected to the issuance of the further certiorari on behalf of the  
543 Italian Government for the purpose of bringing up certain documents alleged to be in the Secretary of State's office, and only requested a further scope to the said further writ of certiorari involving the matters afterwards involved in the order made upon the petitioner's behalf after its motion, to prevent the issuance of a further writ, was overruled, and refers to the recitals of the order of January 4th, 1911, as to those facts. The further writ of certiorari upon behalf of the petitioner having been asked for without prejudice, and the writ having been granted on behalf of the Italian Government, and the further writ on behalf of the petitioner having been refused by the court, the petitioner then applied to the court for a further order for the same matters, subject to the discretion of the State Department as to whether or not the furnishing of the same was consistent with the public interests.—on that record the petitioner insists that all its action calling for documents from the State Department has been without prejudice to its right to make the foregoing objection, and desires to maintain that objection.

THE COURT: Mr. Clarke, in response to the writ of certiorari for which you applied, what return has been made by the Secretary of State to which you object?

MR. CLARKE: There is no objection to that return upon the writ. There is nothing in that return except the transcript of the proceedings before the magistrate.

THE COURT: There is nothing on that return to which you object. You object to the response that was made to the certiorari at the instance of Mr. Garven.

TO MR. GARVEN: Do you insist that this is a proper matter for inquiry?

544 MR. GARVEN: You recall that the formal demand was filed in this court at the request of Mr. Clarke. That came in the nature of a letter with a formal demand attached. Mr. Clarke moved to take this from the record; then motion was made for the further writ of certiorari, which was granted. At that time, I con-



tended that the formal demand should not be made a part of the record in this cause; that we should be limited to the preliminary hearing before the Magistrate, but Mr. Clarke having brought it into the record, it seemed to me we were entitled to have it brought before the court.

Mr. CLARKE: The Secretary of State's Office had limited this return to the certiorari, as will be shown by the envelope and its enclosure, to the record of the Magistrate. The alleged demand sent up in a separate enclosure was no part of the return to the original writ of certiorari, and, as your Honor will see, the alleged demand is not in the return to the original writ, and therefore is to be ignored. That is the situation as to that part of the record as it then stood, simply the record before the magistrate, and had it stood there that would be the matter before you today.

The COURT: My recollection is that this copy of the demand accompanied his return to the certiorari, but not a part of it. The Secretary of State said this was forwarded at the request of Mr. Clarke; then Mr. Clarke objected to receiving it, as I understood, because it was not certified to; that some important part of the certificate had been erased, and then I ruled that as it was not part of the return to the certiorari, it would not be received as such. Then Mr. Garven said that the demand should be a part of the record. I said that he could make an application for a certiorari which  
545 I would then and there allow. Now, in response to this certiorari, the same demand is forwarded by the Secretary of State.

Mr. GARVEN to Mr. CLARKE: Do you still maintain that the return to the certiorari by Judge Blair and the Secretary of State is incomplete?

Mr. CLARKE: I want it on the record.

The COURT: I will receive the demand and dispose of its relevancy later.

Mr. CLARKE: Now, as I understand it, the exhibit is now presented on behalf of the Italian Government?

Mr. GARVEN: That is not so. We do not present it; we have not had a chance to.

The COURT: I have ruled upon the matter. What do you wish to say about it?

Mr. CLARKE: I want to object to it.

The COURT: You may consider that the return of the Secretary of State to the certiorari issued by the Italian Government is presented.

Mr. CLARKE: I object on the ground that there is no right at the present stage of the proceedings to receive further evidence in this case, the case being before a court on what is practically the appellate record, viz., the record before the magistrate, and I desire an exception on that ground.

Whereupon the petitioner, by his counsel, files a bill of exception, which is hereby allowed and sealed accordingly.

JOHN RELLSTAB, *Judge.*



The COURT: I will receive the document and will pass upon its relevancy and sufficiency later on.

546 Mr. CLARKE: I also object to that portion of the document as certified, and which bears an index stamp of July 30th, 1910, on the ground that this is not the proper way in which the receipt of such a document by the Secretary of State can be proved. Section 882 of the Revised Statutes of the United States, provides that a certified copy shall have the same force as the original, but this index mark is no part of the original, and I object that the time of receipt of that document is not proved by the present certificate, and I desire an exception on that ground.

Whereupon the petitioner, by his counsel, files a bill of exception, which is hereby allowed and sealed accordingly.

JOHN RELLSTAB, *Judge*.

The document being an alleged demand dated July 28, 1910 and certified by the Secretary of State under date of Jan. 3, 1911, was thereupon admitted in evidence and marked Exhibit 1 of Jan. 23, 1911, for the respondent.

The COURT: As to the return that was made on the order entered on the motion of the petitioner's counsel requesting the Secretary of State to forward certain correspondence, what is your contention? As I gather it, you would not have requested that order were it not for the fact that the court had permitted the certiorari to issue on the motion of Mr. Garven.

Mr. CLARKE: That is true, but I want the correspondence admitted since you have allowed the alleged formal demand in evidence.

The COURT: Then you withdraw your objection. I understand that your objection relating to the correspondence is withdrawn.

547 Mr. CLARKE: No, except as I have said, now I wish, if your Honor please, on behalf of the petitioner, to put in evidence the first certificate of the Secretary of State on the 17th day of December, certifying this document.

Mr. GARVEN: Is that in reponse to your letter?

Mr. CLARKE: Yes, that is in reponse to my letter.

Mr. GARVEN: We will not object to that.

The document being an alleged demand dated July 28th, 1910 and certified by the Secretary of State under date of Dec. 17, 1910, was admitted in evidence and marked Petitioner's Exhibit No. 1 of Jan. 23, 1911.

Mr. CLARKE: I also offer in evidence the entire correspondence.

The COURT: That is in the case, like all other proceedings. There is no use in having that specially marked.

Mr. GARVEN: I understand that your Honor is not ruling upon the correspondence now. We object to the correspondence that has been forwarded by the Secretary of State in response to the order issued on motion of the petitioner's counsel.

The COURT: I will admit them, and pass upon their relevancy later. I want a full argument upon everything that is relevant in

the mind of counsel when they make their argument.

Mr. Clarke then proceeded with his argument."

Exhibit No. 1 of January 23, 1911, for the Respondent reads as follows:

No. 5718.

UNITED STATES OF AMERICA,  
*Department of State:*

548 To all to whom these presents shall come, Greeting:

I certify that the document hereto annexed is a true copy from the files and records of this Department.\*

In testimony whereof, I, P. C. Knox, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citizenship of the said Department, at the City of Washington, this 3d day of January, 1911.

[L. S.]

P. C. KNOX,

*Secretary of State.*

By R. W. FLOURNOY,  
*Chief, Bureau of Citizenship.*

549

Index Bureau,  
N. Jul- 30, 1910. E.  
Dep't of State.

No. 1229.

Regia Ambasciata D'Italia, Washington, D. C.

MANCHESTER, MASS., 28 luglio, 1910.

Signor Segretario di Stato:

Con riferimento a precedenti comunicazioni e conformemente al disposto dell'articolo V della Convenzione di Estradizione del 23 marzo 1868, ho l'onore di presentare a Vostra Eccellenza formale domanda per l'estradizione del nominato Porter Charlton, reo confesso del delitto di omicidio commesso sulla persona della propria moglie a Moltrasio (Como) delitto contemplato all'articolo II, alinea I, della predetta Convenzione.

Per l'arresto provvisorio del su mensionato imputato Vostra Eccellenza ha già avuto la cortesia di farmi tenere, con Sua nota del 28 giugno scorso No. 864, il certificato preliminare d'arresto contemplato dall'articolo II della Convenzione Addizionale dell' 11 Giugno 1884.

A conferma di questa domanda ho l'onore di trasmettere qui unito a Vostra Eccellenza gli atti dell'istruttoria compiuta dal Tribunale di Como a riguardo del predetto omicidio. Tali documenti sono stati regolarmente visti dalla Ambasciata degli Stati Uniti in Roma.

\*For the contents of the annexed document the Department assumes no responsibility.

La attesa del relativo "warrant" l'ederal e della cortese restitizion e di questi documenti per essere presentati al Tribunale competente, colgo l'incontro per rinnovarLe, Signor Segretario di Stato, insieme ai miei anticipati ringraziamenti, gli atti della mia piu' alta considerazione.

550

MONTAGLIARI.

A Sua Eccellenza, L'On. P. C. Knox, Segretario di Stato, Washington.

551

*Translation.*

No. 1229.

Royal Embassy of Italy.

MANCHESTER, MASS., *July 28, 1910.*

Mr. Secretary of State:

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before Your Excellency a formal request for the extradition of Porter Charlton, who has confessed the crime of murder committed on the person of his own wife at Miltrasio, Como, which crime is specified in Article II, section I of the said Convention.

Your Excellency has already been so good as to forward to me, in Note No. 864 of June 28 last, the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

In support of this request, I have the honor to transmit herewith to your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly visaed by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return of the enclosed papers for submission to the competent Court, I avail myself of this opportunity to renew to your Excellency together with my thanks in advance, the assurance of my highest consideration

MONTAGLIARI.

552      Petitioner's Exhibit No. 1 of Jan. 23, 1911, reads as follows:

No. 5437.

UNITED STATES OF AMERICA,  
DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the files of this Department.

In Testimony Whereof, I, P. C. Knox, Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of

Citizenship of the said Department, at the City of Washington, this 17th day of December, 1910.

[L. S.]

P. C. KNOX,

*Secretary of State,*

By R. W. FLOURNOY,

*Chief Bureau of Citizenship.*

553

No. 1229.

Regia Ambasciata D'Italia, Washington, D. C.

MANCHESTER, MASS., 28 luglio, 1910.

Signor Segretario di Stato:

Con riferimento a precedenti comunicazioni e conformemente al disposto dell'articolo V della Convenzione di Estradizione del 23 marzo 1868, ho l'onore di presentare a Vostra Eccellenza formale domanda per l'estradizione del nominato Porter Charlton, reo confesso del delitto di omicidio commesso sulla persona della propria moglie a Moltrasio (Como) delitto contemplato allo articolo II, alinea I, della predetta Convenzione.

Per l'arresto provvisorio del su menzionato imputato Vostra Eccellenza ha già avuto la cortesia di farmi tenere, con Sua nota del 28 giugno scorso, No. 864, il certificato preliminare d'arresto contemplato dall'articolo II della Convenzione Addizionale dell' 11 Giugno 1884.

A conferma di questa domanda ho l'onore di trasmettere qui unito a Vostra Eccellenza gli atti dell'istruttoria compiuta dal Tribunale di Como a riguardo del predetto omicidio. Tali documenti sono stati regolarmente visti dalla Ambasciata degli Stati Uniti in Roma.

In attesa del relativo "warrant" Federale e della cortese restituzione di questi documenti per essere presentati al Tribunale competente, colgo l'incontro per rinnovarle, Signor Segretario di Stato, insieme ai miei anticipati ringraziamenti, gli atti della mia più alta considerazione.

MONTAGLIARI.

A Sua Eccellenza, L'On. P. C. Knox, Segretario di Stato, Washington.

554

*Translation.*

No. 1229.

Royal Embassy of Italy.

MANCHESTER, MASS., July 28, 1910.

Mr. Secretary of State:

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton, who has confessed

the crime of murder committed on the person of his own wife at Miltrasio, Como, which crime is specified in Article II, section I of the said Convention.

Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

In support of this request, I have the honor to transmit herewith to your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly visaed by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return of the enclosed papers for submission to the competent court, I avail myself of this opportunity to renew to your Excellency, together with my thanks in advance, the assurance of my highest consideration.

MONTAGLIARI.

555      34th. In entering an order against the objection and exception of petitioner's counsel allowing a further writ of certiorari to the Secretary of State on behalf of the Italian Government directed to the Hon. Secretary of State of the United States, requiring him to certify as set forth in said writ, the following matters, among others, namely: a true copy of the demand of the Kingdom of Italy upon the United States Government for the extradition of Porter Charlton, dated on or about July 30th last, and the date of the filing of the same in the office of the Secretary of State, the said offer and objections being set forth and recited in the order herein of the 30th day of December, 1910.

35th. In admitting in evidence, on the hearing before the Circuit Court, against the objection and exception of petitioner's counsel, the alleged demand bearing date on or about July 28, 1910, as certified by the Secretary of State, as proof of the date of its presentation within the forty days required by the treaty — the full substance of such evidence so admitted by the court and to which exception was taken as aforesaid being as follows:

"The COURT: I will receive the document and will pass upon its relevancy and sufficiency later on.

Mr. CLARKE: I also object to that portion of the document as certified, and which bears an index stamp of July 30th, 1910, on the ground that this is not the proper way in which the receipt of such a document by the Secretary of State can be proved. Section 882 of the Revised Statutes of the United States provides that a certified

556      copy shall have the same force as the original, but this index mark is no part of the original, and I object that the time of receipt of that document is not proved by the present certificate, and I desire an exception on that ground.

Whereupon the petitioner, by his counsel, files a bill of exception, which is hereby allowed and sealed accordingly.

JOHN RELLSTAB, *Judge.*

The document being an alleged demand, dated July 28, 1910 and certified by the Secretary of State under date of January 3, 1911, was thereupon admitted in evidence and marked Exhibit 1 of Jan. 23, 1911, for the respondent. A copy of the same is contained in the foregoing assignment of errors numbered 33rd, which is referred to and make a part hereof."

36th. In holding that there was any evidence before the magistrate of any compliance by Italy with the requirements of the treaty that Italy should, within forty days after the arrest of the accused, make a formal demand for the extradition of the prisoner.

37th. In holding that there was any evidence before the magistrate of any compliance by Italy with the requirements of the treaty as follows:

1st. That she should present a requisition for the surrender of a fugitive from justice accompanied by a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the *disposition* upon which such warrant may have been issued, or a requisition to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime, without such documents;

2nd. That she should within forty days after such arrest, present a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such warrant may have been issued, and a formal demand for his or her extradition.

38th. In holding that there was any evidence before the Secretary of State of due compliance by Italy with the requirements of the treaty that she should, within forty days after the arrest, present a formal demand for the extradition of the prisoner.

39th. In holding that there was any evidence before the Secretary of State of due compliance by Italy with the requirements of said treaty, namely:

1st. That she should present a requisition for the surrender of a fugitive from justice accompanied by a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such warrant may have been issued, or a requisition to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime, without such documents;

2nd. That she should, within forty days after such arrest, present a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such warrant may have been issued, and a formal demand for his or her extradition.

40th. In holding that there was any evidence before the Magistrate, the Secretary of State or the United States Circuit Court, on said habeas corpus, of due compliance by Italy with the requirements of said treaty that she should, within forty days after the arrest of the accused, present a formal demand for the extradition of the prisoner.

41st. In holding that there was any evidence before the Magis-

trate, the Secretary of State or the United States Circuit Court, on said hearing, of due compliance by Italy with the requirements of said treaty as follows:

1st. That she should present a requisition for the surrender of a fugitive from justice accompanied by a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such warrant may have been issued, or a requisition to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime, without such documents;

2nd. That she should, within forty days after such arrest, present a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such warrant may have been issued, and a formal demand for his or her extradition.

42nd. In holding that the alleged formal demand of July 28, 1910, a copy of which is above set forth in assignment of errors numbered 33rd, was a proper or legal formal demand under the terms and conditions of the treaty, vesting Italy with any right to demand the deportation of the prisoner herein as a citizen of the United States pursuant to the treaty.

43rd. In holding that the alleged formal demand set forth in assignment of errors herein numbered 33rd, stating "Referring to previous communications," was a demand under the treaty and not a request under international law and was not ineffective and void as being a mere pretended compliance by Italy with the terms of said treaty while in legal effect a repudiation of the very construction under which the rights under the demand were claimed, the full substance of the said previous communications being substantially as follows:

June 15, 1910: Montagliari requests Secretary of State to arrest Charlton by telegram.

June 19, 1910, Knox acknowledges telegram, and states powers of Secretary of State in the premises.

June 20, 1910, Montagliari writes to Secretary of State: "It was not on the strength of the existing Treaty of Extradition that I had the honor to apply to your Excellency with a request that you kindly take measures for the eventual arrest of the said Charlton, as I presume that the Government of the United States would not grant the extradition of one of her citizens."

June 23, 1910, Montagliari to Knox, telegram, stating arrest of Charlton and requesting delivery of "Federal warrant pending arrival extradition documents."

June 24, 1910, Knox to Montagliari, says: "In view of the fact that Porter Charlton is understood to be an American citizen, as you indicate in your note of June twenty, I beg also to inquire whether or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your Government wishes to be understood as surrendering its view heretofore entertained and as being now willing to adopt as to cases which may hereafter arise



between the two Governments, the view that the Extradition Treaty of eighteen sixty-eight, eighteen sixty-nine and eighteen eighty-four between the United States and Italy, require the surrender by each Government of any and all persons, irrespective of the nationality, who, having been convicted for or charged with commission of any of the crimes specified in the treaty within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other, and further and specifically to inquire whether the Government of Italy now proposes as to all cases arising in the future, to deliver to the Government of the United States under and in accordance with the Treaty provisions those Italian subjects who, committing crimes in the United States, take refuge in Italy."

June 25, 1910, telegram Montagliari to Knox: "I am not able to answer second part of your telegram (of June 24th) not having yet received instructions, but I have ground to believe that Italian Government would be willing to send all documents referring to the case should United States Government wish to have culprit judged by American courts for the crime he committed in Italy."

June 25, 1910, telegram Knox to Montagliari, in view of Charlton's arrest, etc., assumes that he is now awaiting instructions from Italian Government.

June 27, 1910, telegram, Montagliari to Knox, requesting preliminary mandate prescribed in Art. 2 of Convention of 1884, so as to maintain arrest of Porter Charlton.

June 28, 1910, Knox to Montagliari, forwards preliminary mandate, and states "that the certificate is sent with the distinct understanding that it is without prejudice to the right of this Government hereafter to determine the ultimate action to be taken by it in this case, in view of the answer already promised by the Italian Government to the question contained in the Department's telegram of the 24th instant."

561 July 1, 1910, Montagliari to Knox:—

"By telegram of June 24 last, Your Excellency inquired whether in instituting extradition proceedings in the case of Porter Charlton who confessed having committed murder at Moltrasio, the King's Government intended to depart from the rule, heretofore observed, not to surrender its own subjects and whether it was to be inferred that Italians guilty of an offense committed on American Territory who should take refuge in Italy, should hereafter be delivered without fail to the American Government.

I now have the honor to inform your Excellency that the King's Government cannot depart from the principle established by our law that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the Extradition Convention. Indeed, it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation.

The Italian law does not consent to the extradition of nationals,

but the Italian courts are competent to try, on the request of a foreign government, their nationals who may have committed offences on that Government's Territory.

Contrariwise, the laws of the United —, by not permitting local tribunals to try American citizens for offences committed abroad, seem to admit of their being extradited. Otherwise, an offender would, under theegis of the law itself, escape the punishment he deserves.

I have the honor to inform your Excellency that the requisite extradition papers in the case of Porter Charlton will be forwarded to me without delay and in the meanwhile I beg you to kindly cause the prisoner to be held in provisional detention.

Accept, Mr. Secretary of State, the assurance of my highest consideration.

MONTAGLIARI."

July 12, 1910, Montagliari to Knox:

"In continuation of previous correspondence, I have the honor to transmit herewith to Your Excellency a copy of the warrant of arrest issued June 13 by the Examining Magistrate of the Civil and Criminal Court of Como, against Mr. Porter Charlton.

July 22, 1910, Knox to Montagliari, acknowledges receipt of the copy of warrant of arrest. Matter is now in the hands of the court, and returns the copy of the warrant of arrest therewith.

July 28, 1910, Montagilari to Knox. Alleged formal demand in the form set forth in the assignment of errors, herein numbered 33rd as above set forth, and beginning as follows:

"Mr. Secretary of State:

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before Your Excellency a formal request for the extradition of Porter Charlton," etc.

44th. In failing to hold that a bona fide formal demand for the extradition of Charlton under the rights and obligations created by the treaty to be presented within the forty days after the arrest, was a pre-requisite to the right of Italy herein to obtain the extradition of the prisoner.

563 45th. In failing to hold the following propositions, namely:

that the alleged formal demand, plaintiff's Exhibit No. 1 of January 23, 1911, a copy of which is set forth in assignment of errors herein, numbered 33rd, is a demand of the character which imposed no obligation on the United States Government under its construction and interpretation of the treaty to comply therewith, and thereby there arose from such demand no obligation to comply with the same under the treaty on the part of the United States, and in failing to hold that, in the absence of an obligation to comply with said demand under the treaty stipulations, no right existed in an executive officer to arbitrarily decide the option to extradite thence arising by deporting a citizen contrary to the constitutional limitations.

46th. In failing to hold that the alleged formal demand of Italy, bearing date July 28, 1910, a copy of which is set forth in assign-

ment of errors herein numbered 33rd, hereby referred to, was a mere pretended and evasive attempt at compliance with the treaty stipulations, and as such, is null and void since thereby Italy attempts to secure a benefit, while at the same time repudiating the burden of complying with the said rights and obligations under the treaty.

Wherefore your petitioner, as next friend of Porter Charlton, prays that the order dismissing the said writs of habeas corpus and certiorari and remanding the said Porter Charlton to the custody of James J. Kelly, Sheriff of Hudson County, State of New Jersey, and denying the right of the said Porter Charlton to be released from custody be reviewed, and that the said Porter Charlton be discharged from custody.

PAUL CHARLTON,

*As Next Friend of Porter Charlton, Petitioner.*

By FLOYD CLARKE,

*His Attorney.*

R. FLOYD CLARKE,

*Attorney for Petitioner.*

37 Wall Street, Borough of Manhattan, New York City.

Read this 30th day of January, 1911.

JOHN RELLSTAB,

*United States Judge.*

(Endorsed:) #6082. United States Circuit Court for the District of New Jersey. In the matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding, entitled "In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original.) Assignment of Errors. R. Floyd Clarke, Att'y for Petitioner, 37 Wall St., New York City. Filed January 30, 1911. H. D. Oliphant, Clerk.

565 Circuit Court of the United States for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

To the Supreme Court of the United States:

The petition of Paul Charlton respectfully shows:

1st. That your petitioner is the father and next friend of Porter Charlton, who is now, and always has been since his birth, a citizen of the United States, and is insane and is unlawfully imprisoned and illegally restrained of his liberty in the County Jail of the County of Hudson in the City of Jersey City, State of New Jersey, and is so unlawfully imprisoned and illegally restrained and confined in the said County Jail, in violation of the treaty and Convention of extra-

dition between the United States of America and the Kingdom of Italy, ratifications exchanged September 17, 1868, and proclaimed September 30th, 1868, and of the Convention or treaty additional to the extradition convention or treaty of 1868 between the same governments, ratified by the respective governments April 24, 1885, and proclaimed April 24, 1885, and in violation of the true construction and application of the said treaty and in violation of the true construction and application of the Constitution of the United States, and in violation of the rights of the said Porter Charlton as a citizen of the United States, affecting the validity and construction  
 566 of the said treaty made between the United States and the said Kingdom of Italy, a foreign government, and in violation of the true construction and application of the Constitution of the United States with reference to the said treaty and the rights of a citizen of the United States thereunder, in the custody of James J. Kelly, Sheriff of Hudson County, New Jersey, claiming or pretending to so restrain your petitioner by virtue or authority of a certain warrant of commitment to him alleged to have been issued by the Hon. John A. Blair, a Judge of the Court of Oyer and Terminer of Hudson County, New Jersey, sitting as a committing magistrate and acting therein by authority conferred upon him by the Act of Congress of August 12, 1848, concerning the extradition of fugitives from a foreign government under a treaty or convention between this and any foreign government and the acts amending and supplementing the same, which charges the said Porter Charlton with the commission of the crime of murder upon his wife Mary Charlton, alleged to have been committed by the said Porter Charlton at Moltrasio in the Kingdom of Italy.

2nd. That the said Porter Charlton was arrested and is held by the said James J. Kelly, Sheriff of Hudson County, State of New Jersey, upon the aforesaid warrant, and that the said warrant was issued by the said Hon. John A. Blair, sitting as aforesaid, as the result of certain proceedings then and there pending before the said Hon. John A. Blair sitting as aforesaid, and begun by a preliminary warrant for the preliminary arrest of the said Porter Charlton  
 567 on the 24th day of June, 1910, on said charge, based upon the complaint of the Hon. *Hon.* Gustavo de Rosa, Vice Consul of the King of Italy in the United States of America for the jurisdiction of the State of New Jersey, charging the said Porter Charlton with the commission of the said alleged crime and as being a fugitive from justice in this country, and demanding a warrant of commitment under the United States Revised statutes.

3rd. That the said Porter Charlton was arraigned before the aforesaid the Hon. John A. Blair, one of the Judges of the Hudson County Court of Oyer and Terminer, a court of superior jurisdiction, sitting as a United States Magistrate under Section 5270 of the United States Revised Statutes upon said complaint on the 24th day of June, 1910. Thereupon adjournments were had, the said Porter Charlton being committed as aforesaid to the Hudson County Jail by order of the said Court, to the end that the evidence of his criminality might be heard and considered and that said Porter Charlton

has since been in said prison and that adjournments have been taken from June 24, 1910, to September 21, 1910, when a hearing was had on said complaint and thereupon on the 14th day of October, 1910, a decision was made by the said The Hon. John A. Blair sitting as aforesaid, and thereupon said Judge issued his warrant as aforesaid for the commitment of said Porter Charlton so charged to the said County Jail in the custody of the said James J. Kelly in Jersey City, there to remain until the surrender of said prisoner should be made pursuant to the Act of Congress in such case made and provided.

4th. That on the hearing before said Magistrate there was no legal proof of the commission of any crime or any proof on which reasonable cause could be predicated of the commission of any crime by said son of your petitioner in *in* that certain documents which were admitted against the objection and protest and exception of your petitioner and his said son were not and are not duly authenticated under the statutes in such cases made and provided so as to be entitled to be used in evidence in the proceeding aforesaid and thereby the said Court had no jurisdiction under the statute and treaty in such case made and provided.

5th. That at the time of the hearing of the matter of the extradition of Porter Charlton before the Judge of the Court of Oyer and Terminer of Hudson County, New Jersey, sitting as federal examining magistrate under acts of Congress certain witnesses qualified by age, knowledge and experience, physically present in Court, were offered to be sworn on behalf of the accused for the purpose of proving that the accused was insane on the date when the crime was alleged to have been committed, and on the date of the said hearing, to wit, September 21, 1910, and said Judge so sitting refused to allow said witnesses to be sworn or any evidence as to the insanity of the accused at the time of the commission of the crime or at the date of the hearing, to be introduced, and exception was taken thereto. And such insanity is the reason why this petition is signed by your petitioner instead of said son.

6th. That at the time of the hearing of the matter of the extradition of Porter Charlton before the Judge of the Court of Oyer and Terminer of Hudson County, New Jersey, sitting as a federal examining magistrate under the acts of Congress as aforesaid, the following facts were proved, namely:

569 (1) That the said Porter Charlton was and had been since the first day of January, 1900, a citizen of the United States of America.

(2) That it is provided in Article IV. of the amendments to the Constitution of the United States that

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated,"

and by Article V.:

"That no person shall be held to answer for a capital or or otherwise infamous crime unless on presentation or indictment of a grand

jury \* \* \* nor be deprived of life, liberty or property without due process of law."

(3) That under Section 2 of Article II. of the Constitution of the United States the treaty-making power is lodged in the President of the United States by and with the concurrence of two-thirds of the Senators of the United States present when such treaty is presented for consideration.

(4) The- pursuant to the authority so conferred, there was proclaimed between the Government of the United States and the Kingdom of Italy a Convention of Extradition upon September 30, 1868, which provided (Article I) for the mutual delivery of "persons" who, having committed crime in territory within the jurisdiction of the demanding government, shall have sought asylum within territory under the jurisdiction of the other, and further provided (Article II) that among the crimes for which such persons shall be mutually delivered up was the crime of murder; it was further provided (Article V.) that upon proper application by the diplomatic representatives of the Kingdom of Italy in the United States,  
570 or designated agent, that the President of the United States or the proper official of the Kingdom of Italy should issue his mandate or warrant, through the Department of State, for the apprehension of the alleged fugitive from justice.

(5) Upon April 24, 1885, there was proclaimed a convention between the Government of the United States and the Kingdom of Italy additional to the extradition convention of 1868 (supra), which provided, inter alia, (Article II, additional to Article V of the Convention of 1868), that, after the arrest of the alleged fugitive:—

"\* \* \* the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence \* \* \* If, however, the requisition together with the documents above provided for, shall not be made as required by the diplomatic representative of the demanding government, or in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

(6) That subsequent to April 24, 1885, and prior to January 1, 1890, frequent demands were made by the government of the United States upon the government of Italy for the extradition of subjects of Italy fugitive from the justice of the United States in asylum in territory under the jurisdiction of the Government of Italy, on the ground that by the true construction of said treaty citizens of the asylum country were included in the word "persons" as used in its first article, and such demands were refused by the  
571 Kingdom of Italy on the ground that by the true construction of said treaty citizens of the asylum country were not included in the word "persons" as used in the first article thereof, and that it was against the public policy of the government of Italy as construed by its political authorities to surrender its citizens on extradition. On January 1, 1890, after enactment by the parliament of Italy, there was put into effect within the Kingdom of Italy by royal decree of the King of Italy, a penal code for the Kingdom of Italy, Article 9 of which provided as follows:



9. "The extradition of a citizen is forbidden."

(7) The Government of the United States, through its executive and political officials, acquiesced in the construction placed by the political and legislative departments of the Kingdom of Italy upon the word "persons" contained in the Conventions of extradition in force as not including citizens of Italy, fugitive from the justice of the United States, in asylum in Italy, and on requests made by Governors of States of the United States for demand for extradition of Italian citizens, so fugitive and in asylum, refused to make any such demand and took no further action thereon.

(8) That, in consequence of the political construction placed upon said treaty by the political authorities of the Kingdom of Italy and of the prohibition in contravention of the provisions of said extradition treaties by the supreme legislative authority of the Kingdom of Italy, the said extradition convention of 1865, and the additional convention of 1885, were denounced and annulled, in so far as the same applied, reciprocally, to citizens of either country, fugitive from the justice of the other, in asylum in the country of which they were citizens or subjects.

572 (9) That against the denouncement and annulment of said extradition conventions by the foregoing political and legislative action of the Kingdom of Italy, and a breach of the mutual engagement therein contained by the political and legislative action of the Kingdom of Italy, the United States has not sought either of the two remedies open to it under public law, to wit:

It has neither declared war, nor demanded arbitration in consequence thereof, but has acquiesced therein as aforesaid.

7th. That the said Porter Charlton was arrested within the jurisdiction of the Government of the United States, namely, in Hudson County, State of New Jersey, on June 23, 1910 and thereafter and on the 24th day of June, 1910, was committed to prison under the preliminary warrant for his apprehension, that he might be brought before the Judge to the end that the evidence of his criminality might be heard and considered, and was thereupon committed to the Hudson County Jail on said 24th day of June, 1910, into the custody of the said Sheriff as aforesaid, and has remained so imprisoned ever since.

8th. That no documents were presented either to the Department of State of the United States, or to the Court of Oyer and Terminer of Hudson County, New Jersey, sitting under the provisions of the Acts of Congress in that behalf made and provided as a Federal Examining Magistrate in said extradition matter as aforesaid, within forty days, as provided in said extradition convention and the addition thereto, and said documents when presented on August

573 11, 1910, more than forty days after the arrest of the said Porter Charlton, as aforesaid, were neither accompanied by the formal demand of the Government of Italy for the extradition of Porter Charlton, nor were the documents so presented authenticated, identified and offered in the manner provided by said Convention and addition thereto and the statutes in such case made and provided.

9th. That the requisition for the surrender of the said Porter



Charlton alleged to be a fugitive from justice, made by the Kingdom of Italy, as aforesaid, on which the certificate or mandate of the Secretary of State in this proceeding was issued, was a requisition without any accompanying documents, as provided in the second paragraph of Article V as amended and supplemented by the 1884 Convention additional to the Extradition Convention between the United States and Italy of 1868, and no formal demand for the extradition of said Porter Charlton has been presented within forty days or up to date.

10th. That your petitioner and his said son have duly objected to the continuance of any proceedings in extradition under the said complaint and warrant as aforesaid before the said Judge of the Court of Oyer & Terminer of Hudson County, New Jersey, sitting under the provisions of the Act of Congress in that behalf made and provided as a Federal Examining Magistrate in extradition matters, on the ground that the said Judge had no authority or jurisdiction in the premises to proceed therewith on the grounds aforesaid, or under any provisions of the Constitution or laws of the United States or any treaty of the United States with any foreign country and have demanded that said proceeding be dismissed, and that

574 said objections have been overruled by the said Judge sitting as a Federal Examining Magistrate in extradition matters as aforesaid, and said Judge has made a decision therein as aforesaid and your petitioner and his said son have duly filed exceptions thereto.

11th. That thereafter and on or about the 3rd day of November, 1910, the said Hon. John A. Blair, sitting as Committing Magistrate as aforesaid, certified his decision, together with a copy of all the testimony taken before him, to the Hon. The Secretary of State of the United States of America, and thereafter, your petitioner and his said son having duly objected to the continuance of said proceedings upon all the grounds stated herein as herein expressed, the said objections were overruled by the said Secretary of State on or about the 9th day of December, 1910, and the said Secretary of State has issued his warrant for the surrender of the said Porter Charlton so committed to be delivered to such person as shall be authorized in the name of and on behalf of the Italian Government under the provisions of Section 5272 of the Revised Statutes of the United States, to all of which your petitioner and his said son have objected and duly excepted.

12th. That thereupon, your petitioner, as the father and next friend of Porter Charlton, the said accused person, who, as above stated, is insane and incompetent to take care of his rights in the premises, duly filed his petition in the Circuit Court of the United States for the District of New Jersey, in the above entitled matter, verified the 9th day of December, 1910, for a habeas corpus of the body of the said Porter Charlton and a certiorari to bring up the said records in the office of the Hon. John A. Blair, sitting as a

575 Committing Magistrate as aforesaid, and in the office of the said Secretary of State, setting forth the facts and circumstances as aforesaid and other facts and circumstances germane to the

said application, and thereupon, pursuant to the statute in such case made and provided, the Hon. John Rellstab allowed a writ of habeas corpus and certiorari on said petition directed to the said James J. Kelly, Sheriff of Hudson County, State of New Jersey, commanding that the said Sheriff have the body of Porter Charlton by him detained at a Stated Term of the Circuit Court of the United States for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer and State of New Jersey, on the 19th day of December, 1910, at 10:30 o'clock in the forenoon of that day, and to return all proceedings taken against the said Porter Charlton and thereupon, pursuant to the statute in such case made and provided, the Hon. John Rellstab allowed a writ of certiorari directed to the Hon. John A. Blair, a Judge of the Court of Oyer & Terminer of Hudson County, New Jersey, sitting as a Committing Magistrate and acting therein under authority conferred upon him by Act of Congress of 1848 concerning the extradition of fugitives from a foreign Government under a treaty or convention between this and any foreign government, and the acts amending and supplementing the same, in the extradition proceeding pending therein for the extradition of the said Porter Charlton under the treaty between the United States of America and the Kingdom of Italy, and also to the Hon. P. C. Knox, Secretary of State of the United States of America, commanding them to return before a Stated Term of the Circuit Court of the United States for the District of New Jersey, to be held in the New Jersey State Capitol Building, in the City of Trenton, County of Mercer and State of New Jersey, on the 19th day of December, 1910, a true transcript of all proceedings had and taken before the said Magistrate against the said Porter Charlton upon the complaint of the said Italian Vice-Consul and under and pursuant to the warrant issued by said Magistrate for the commitment of said Porter Charlton and also all proceedings taken before the said Magistrate in said matter, and said writs were both made returnable as aforesaid before the Circuit Court of the United States for the District of New Jersey, at a Stated Term thereof, to be held on the 19th day of December, 1910.

13th. That thereupon the said Porter Charlton was duly brought before said Circuit Court of the United States for the District of New Jersey by the said James J. Kelly, Sheriff of Hudson County, State of New Jersey, at the time mentioned in said writ, and he made the return as required by the terms of the said writ, and the aforesaid, the Hon. John A. Blair sitting as a Committing Magistrate under the United States Act as aforesaid, made his return to the aforesaid writ of certiorari to the said court as required by the terms thereof, and the said, the Hon. P. C. Knox, Secretary of State of the United States of America, made his return to the aforesaid writ of certiorari to the said court.

14th. That thereupon such proceedings were had as are recited and set forth in the order entered herein on the 30th day of December, 1910, whereby a further writ of certiorari issued on the motion of Pierre P. Garvan, Esq., attorney for the Hon. Gustavo di Rosa, vice-consul of the Kingdom of Italy in the city of New York,

directed to the Honorable the Secretary of State of the United States requiring him to certify as set forth in said writ the following  
577 matters, among others, to wit:—"A true copy of the demand from the Kingdom of Italy upon the United States Government for the extradition of Porter Charlton, dated on or about July 30 last, and the date of the filing of the same in the office of the Secretary of State," such further writ of certiorari being obtained against the objection of the petitioner; and thereupon the petitioner obtained an order bearing date the 4th day of January, 1911 requiring the State Department to furnish for the information of the Court, if in its discretion the State Department should not deem it prejudicial to the public interests so to do, the correspondence between the Italian Government and the American Government as to the extradition of Porter Charlton, all the documents presented under the treaty, and a certificate stating the dates of the receipt of the same, and the correspondence between the Secretary of State and R. Floyd Clarke, counsel for the prisoner, in regard to the matter. Thereafter a hearing was had on the 23d day of January, 1911 in this matter, and an order entered herein on the same day, as more fully set forth in paragraph 15 below.

That your petitioner presents in connection with his application for the allowance of an appeal herein from said order an assignment of errors in respect to the said hearing and decision made thereon, and prays that the same may be taken and made a part hereof as a further statement of the grounds of his prayer for the allowance of an appeal from the said order.

That your petitioner is advised by counsel that there are grave doubts as to whether the proceedings referred to in the petition have not infringed the rights of the said prisoner Porter Charlton under the constitution and laws of the United States, and whether  
578 the detention of Porter Charlton under and by virtue of the mandate or warrant referred to in the petition on said writs of habeas corpus and certiorari is not wholly without authority of law, and your petitioner on behalf of said prisoner, as his next friend, desires in good faith to submit the constitutional questions involved herein and such other questions as are pertinent, to the Supreme Court of the United States for their determination.

In connection herewith your petitioner presents with this petition his bond for the costs on appeal to the amount of five hundred dollars, as fixed by the Court, a certificate of reasonable doubt to allow appeal from said order, his assignment of errors in regard to said order and decision, and a citation to the respondent requiring him to show cause before the United States Supreme Court why said decision should not be reviewed, modified or reversed.

15th. Thereupon said matter was adjourned from time to time until the 23d day of January, 1911, at which time the hearing of arguments of counsel before the said court on said petition and writs and the returns and answers thereon and replies thereto were heard, and after hearing arguments of counsel decision was reserved by the court, and thereafter and on the 23d day of January, 1911, an order was entered dismissing the said writs of habeas corpus and certiorari and remanding the said Porter Charlton to the custody of

the said James J. Kelly, Sheriff of Hudson County, New Jersey, pending such proceedings on appeal as petitioner might be advised to make or until the further order of the court upon notice by said complainant after ten days from the date of said order.

Wherefore your petitioner, as next friend of the said Porter Charlton, feeling himself and the said Porter Charlton aggrieved  
 579 by said order, appeals therefrom to the Supreme Court of the United States, and prays that this appeal may be allowed and that the transcript of the said order and of all of the proceedings in the United States Circuit Court in and for the District of New Jersey, and of the return of the said James J. Kelly, Sheriff of Hudson County, State of New Jersey, upon said writs of habeas corpus and certiorari, and the return of the said The Hon. John A. Blair, a Judge of the Court of Oyer & Terminer of Hudson County, New Jersey sitting as Committing Magistrate and acting therein under the Act of Congress as aforesaid, and the return of the said, the Hon. P. C. Knox, Secretary of State, to the said writ of certiorari may be transmitted to the Supreme Court of the United States for review.

Dated New York, New York, January 24, 1911.

PAUL CHARLTON,

*Petitioner and Next Friend of Porter Charlton.*

R. FLOYD CLARKE,

*Attorney for Petitioner.*

37 Wall Street, Borough of Manhattan, New York City.

580 UNITED STATES OF AMERICA,

*District of New York, ss:*

Paul Charlton, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

PAUL CHARLTON.

Subscribed and sworn to before me this 24th day of January, 1911.

[L. s.]

WIRT HOWE,

*Notary Public, New York County, N. Y.*

UNITED STATES OF AMERICA,

*District of New York:*

Paul Charlton, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same is in all respects true.

PAUL CHARLTON.

Subscribed and sworn to before me this 24th day of January 1911.

[L. s.]

WIRT HOWE,

*Notary Public, New York County, N. Y.*

581        6082. 17-105. United States Circuit Court for the District of New Jersey. 6 —. In the Matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original) Petition for Appeal. R. Floyd Clarke, Attorney for petitioner, 37 Wall St., New York City. The within appeal is hereby allowed. Dated ——. ——. ——. Judge. Service of a copy of the within appeal is hereby admitted. Filed January 30, 1911. H. D. Oliphant, Clerk.

582        At a Stated Term of the United States Circuit Court for the District of New Jersey, in the Third Circuit, Held at the United States Court Room, in the Capitol Building, in the City of Trenton, on the 30th day of January, in the Year 1911.

Present: Hon. John Rellstab, J.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a writ of Certiorari in the Pending Proceeding, Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

The above matter having come on to be heard on the petition of Paul Charlton, as next friend of Porter Charlton verified the 9th day of December, 1910, and upon the writs of habeas corpus and certiorari thereupon issued, the said writ of habeas corpus being a writ, dated December 10, 1910, directed to James J. Kelly, Sheriff of Hudson County, State of New Jersey, United States of America, commanding the production of the body of Porter Charlton, and the said writ of certiorari being directed to the Hon. John A. Blair a judge of the Court of New Jersey sitting as an examining

583        magistrate under the United States Revised Statutes, and to the Hon. P. C. Knox, Secretary of State of the United States of America, commanding that they return the proceedings in the above matter before the magistrate, and on the returns to the said writs of habeas corpus and certiorari made by the said Sheriff and the said Hon. John A. Blair, judge of the state court, sitting as a committing magistrate under the United States Revised Statutes, and the Hon. P. C. Knox, Secretary of State, and upon the further proceedings set forth in the orders entered herein on the 30th day of December, 1910, and the 4th day of January, 1911, and thereafter and on the 23rd day of January, 1911, an order having been entered herein that the said writs of habeas corpus obtained on behalf of the petitioner be and the same is thereby discharged and dismissed and the prisoner remadned as set forth in said *doder*, with a stay of ten days with liberty to the petitioner to make such application on appeal as petitioner might be advised during such stay, and the petitioner. as next friend of Porter

Charlton, having prayed in open court the allowance of an appeal from the foregoing final decision in this proceeding, and filed herein his written petition, verified the 24th day of January, 1911, praying for the allowance of said appeal, together with an assignment of errors in connection therewith and the certificate of the Hon. John Rellstab, United States Judge, certifying that, questions were raised on the hearing herein under the 4th and 5th subdivisions of Section 1 of the Act of Congress of March 3, 1891, and the citation accompanying said petition and assignment of errors and appeal bond in the sum of five hundred 00/00 dollars (\$500.00), which is to operate as a supersedeas herein;

And it is further ordered that said appeal is by the court hereby allowed, and it is further certified that, the penalty of the appeal bond, which is to operate *as* a supersedeas, is fixed at the sum aforesaid, and the said bond is approved as to form, amount and sufficiency;

And it is further ordered that, pursuant to Rule 34 of the United States Supreme Court, pending this appeal from said final decision of this court declining to grant the said writ of habeas corpus, the custody of the prisoner shall not be disturbed, but shall remain as aforesaid during such appeal and until the decision of the said Supreme Court of the United States.

JOHN RELLSTAB, *Judge*.

17-105. 6082. United States Circuit Court for the District of New Jersey. In the matter of the application for Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original.) Order allowing appeal from final order dismissing writs of habeas corpus and certiorari and staying of proceedings. R. Floyd Clarke, Att'y for petitioner, 37 Wall St., New York City. Filed January 30, 1911. H. D. Oliphant, Clerk.

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23045.

Circuit Court of the United States for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding, Entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty Between the United States and Italy."

Know all men by these presents that we Paul Charlton, principal, and the American Surety Company, of New York, a corporation duly created, organized and existing under the laws of the State of New York, surety are held and firmly bound unto the United States of America in the full and just sum of Five hundred 00/100 dollars (\$500 00/100), to be paid to the United States of America; for



which payment well and truly to be made we bind ourselves our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of January, 1911.

Whereas, lately at a Stated Term of the Circuit Court of the United States for the District of New Jersey, in a proceeding therein pending entitled "In the matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the 587 pending proceeding entitled 'In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy,'" and order was entered dismissing a writ of habeas corpus and of certiorari sued out by the said Paul Charlton as petitioner and next friend of Porter Charlton and remanding the said Porter Charlton to the custody of James J. Kelly, Sheriff of Hudson County, New Jersey, and denying the application of the said petitioner and of the said Porter Charlton to be released under the said writ of habeas corpus in said extradition proceedings upon which he has been arrested and is in the custody of the said Sheriff as aforesaid, and the said petitioner, as next friend of said Porter Charlton, having appealed to the Supreme Court of the United States of America, and his appeal having been allowed, and a copy of his petition for appeal having been filed in the clerk's office of the United States Circuit Court for the District of New Jersey in order to obtain a review of the aforesaid order;

Now the condition of the above obligation is such that if the said Paul Charlton, as next friend of Porter Charlton as aforesaid, shall prosecute the said appeal to effect and answer all damages and costs if said Paul Charlton fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

PAUL CHARLTON, *Principal*. [SEAL.]

AMERICAN SURETY COMPANY OF  
NEW YORK,

By HORACE P. HOLLISTER,

*Resident Vice-President.*

Attest:

[L. s]

JARED F. HARRISON,

*Res. Assistant Secretary, Surety.*

23045. Original Duplicate.

588 STATE OF NEW YORK,

*County of New York, ss:*

Be it remembered that on this twenty fourth day of January in the year One thousand nine hundred and eleven, before me the subscriber, Wirt Howe, personally appeared Paul Charlton, who, I am satisfied, is one of the obligors named in and who executed the within bond, and I having first made known to him the contents thereof, he did thereupon acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

PAUL CHARLTON.



In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[L. s.]

WIRT HOWE,

*Notary Public, New York County, N. Y.*

Approved Jan. 30, '11.

JOHN RELLSTAB, *Judge.*

589 STATE OF NEW YORK,

*County of New York, ss:*

On this 28th day of January 1911 before me personally appeared Horace P. Hollister, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in Mt. Vernon, N. Y., that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister, further said that he is acquainted with Jared F. Harrison and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said Jared F. Harrison subscribed to the said instrument is in the genuine handwriting of the said Jared F. Harrison and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister, Resident Vice President.

[L. s.]

E. A. FARRELL,

*Notary Public, New York County.*

Certificate filed in all counties.

590 STATE OF NEW YORK,

*County of New York, ss:*

Jared F. Harrison being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws. That said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, Stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" That the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American

Surety Company of New York is worth more than \$6,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

JARED F. HARRISON.

Subscribed and sworn before me this 28th day of January, 1911  
[L. s.] E. A. FARRELL,  
Notary Public, New York County.

Certificate filed in all counties.

591

Form G 362.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

*Financial Statement, Dec. 31, 1910.*

#### Resources.

(\*Home Office Building and Land, unencumbered. \$3,000,000.00)  
(\*\*N. Y. City Water Front, unencumbered. . . . . 163,047.92)

Real estate . . . . .	\$3,163,047.91
Stocks and bonds, market value. . . . .	3,612,561.63
Cash in banks and offices. . . . .	955,804.07
Premiums in course of collection. . . . .	309,412.05
Accrued interest and rents. . . . .	55,469.99
Bills and accounts receivable. . . . .	197,166.67
	<hr/>
	\$8,296,462.32

#### Liabilities.

Capital stock. . . . .	\$2,500,000.00
Surplus . . . . .	3,532,086.89
Reserve for Re-insurance. . . . .	1,377,822.93
***Reserve for contingent claims. . . . .	825,467.48
Reserve for contingent expenses. . . . .	47,545.40
Bills and accounts payable, not due. . . . .	13,539.62
	<hr/>
	\$8,296,462.32

*Appraised at . . . . .	\$3,270,000.00
**Appraised at . . . . .	210,000.00
***Includes special reserve of. . . . .	200,000.00

By NEW YORK INSURANCE DEPARTMENT.

592 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholder's meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 18, 1911, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 13, 1910 for the purpose of nominating officers of the Company, \* \* \* for the ensuing year, beg leave to report as follows:

"We nominate for \* \* \*  
Place, New York, N. Y.

Resident Vice-Presidents:

Richard Demind,  
Horace P. Hollister,  
Marshall L. Brower,  
A. E. Cotterell.

Resident Assistant Secretaries:

A. L. Adams,  
Marshall L. Brower,  
William H. Bishop,  
Horace P. Hollister,  
Jared F. Harrison,  
A. E. Cotterell.

\* \* \* \* \*

593 "Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

\* \* \* \* \*

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

\* \* \* \* \*

STATE OF NEW YORK,

County of New York, ss:

I, H. A. Reiss, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the

foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 19th day of January, 1911.

[L. s.]

H. A. REISS,

*Assistant Secretary.*

595 17-105. 6082. United States Circuit Court for the District of New Jersey. In the Matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the application for the extradition of Porter Charlton under the Treaty between the United States and Italy." (Original.) Bond on security for costs. R. Floyd Clarke, Att'y for petitioner, 37 Wall St., New York City. The within bond is approved as to form, amount and sufficiency of sureties. Dated —. Filed January 30, 1911. H. D. Oliphant, Clerk.

596 Circuit Court of the United States for the District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and a Writ of Certiorari in the Pending Proceeding entitled "In the Matter of the Application for the Extradition of Porter Charlton under the Treaty between the United States and Italy."

I, John Rellstab, one of the Judges of the United States District Court for the District of New Jersey, and as such sitting as one of the judges of the United States Circuit Court for the third judicial circuit, do hereby certify that, upon the hearing of the above cause, the validity, construction and application of the treaties between the United States of America and the Kingdom of Italy with regard to extradition, and the construction and application of the Constitution of the United States, and the rights of the said Porter Charlton as a citizen of the United States affecting the validity and construction of the said treaties and the true construction *adn* application of said Constitution with reference to the said treaties, and the rights of said citizen, were fairly raised by the petition herein for writs of habeas corpus and certiorari, and were argued upon the hearing of the same and were determined by the court.

597 And I further certify that upon said hearing the power and jurisdiction of the Hon. John A. Blair, a Judge of the

Court of Oyer and Terminer of Hudson County, New Jersey, sitting as a Committing Magistrate and acting therein under authority conferred upon him by the Act of Congress approved August 12, 1848, concerning the extradition of fugitives from a foreign government under a treaty or convention between this and any foreign government, and the acts amending and supplementing the same, and under the said treaties and under the United States Revised Statutes and the Constitution of the United States of America, to commit the said Porter Charlton to the jail of the County of Hudson, and to require him to be safely kept therein until he should be surrendered to the Kingdom of Italy under a warrant from the Government of the United States or until he thence be discharged by due process of law, and also the power and jurisdiction of the Hon. P. C. Knox, Secretary of State of the United States of America, under the said treaties and under the said United States Revised Statutes and Constitution of the United States of America, to issue his warrant ordering the person so committed to be delivered to such person as should be authorized in the name of and on behalf of the said Italian Government to be tried for the crime of which said person was accused, were fairly raised by the petition for writs of habeas corpus and certiorari, and were argued upon the hearing of the same and were determined by this court.

Dated Trenton, New Jersey, January 30, 1911.

JOHN RELLSTAB, *Judge*.

598 17-105. 6082. United States Circuit Court for the District of New Jersey. In the Matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original.) Certificate. R. Floud Clarke, Att'y for petitioner, 37 Wall St., New York City. Filed January 30, 1911. H. D. Oliphant, Clerk.

599 United States Circuit Court, District of New Jersey.

In the Matter of the Application of PAUL CHARLTON for a Writ of Habeas Corpus and Certiorari, etc.

STATE OF NEW YORK,

*County of New York, ss:*

Wirt Howe, being duly sworn, says:

He is over twenty-one years of age and resides in the City, County and State of New York.

That on February 14th, 1911, at about the hour of 2:30 o'clock in the afternoon he served the annexed Citation dated January 30th, 1911, signed by John Rellstab, United States District Judge, upon James J. Kelly, Sheriff of Hudson County, New Jersey, at his office in the Court House, in the City of Jersey City, Hudson County, New Jersey, by delivering to him personally a true copy of said Citation and leaving the same with him, at the same time exhibiting

to him the annexed original Citation and the signature of the Judge thereto; and that he knew the person so serving to be James J. Kelly, Sheriff of Hudson County, State of New Jersey.

WIRT HOWE.

Sworn to before me, this 14th day of February, 1911.

[Seal Emile Rieser, Notary Public, Kings County, N. Y.]

EMILE RIESER,  
Notary Public, Kings Co., N. Y.

Certificate filed in New York County.

600 UNITED STATES OF AMERICA,  
*District of New Jersey:*

To James J. Kelly, Sheriff of Hudson County, State of New Jersey, and Gustavo De Rosa, Vice-Consul of the Kingdom of Italy in the United States of America for the Jurisdiction of the State of New Jersey:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States on or before the 27th day of February 1911, pursuant to an appeal on the part of Paul Charlton as the next friend of Porter Charlton, filed in the Clerk's Office of the Circuit Court of the United States for the District of New Jersey, in a certain suit or proceeding entitled "In the matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled 'In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy,'" to show cause, if any there be, why the decision of the United States Circuit Court in the said appeal mentioned should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Given under my hand at the City of Trenton, District of New Jersey, on the 30th day of January, 1911.

JOHN RELLSTAB,  
*United States District Judge,  
Sitting as a Circuit Judge.*

R. FLOYD CLARKE,  
*Attorney for Petitioner, 37 Wall Street,  
Borough of Manhattan, New York City.*

601 [Endorsed:] United States Circuit Court for the District of New Jersey. In the Matter of the application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceeding entitled "In the matter of the application for the extradition of Porter Charlton under the treaty between the United States and Italy." (Original.) Citation. R. Floyd Clarke, Att'y for petitioner, 37 Wall St., New York City. Service of a copy of the within citation is hereby admitted. Dated Feb'y 10/11. Pierre P. Garven Att'y for Italian Gov't.

602 District Court of the United States, District of New Jersey.

Hon. Joseph Cross, Judge.  
Hon. John Rellstab, Judge.  
George T. Cranmer, Clerk.

TRENTON, N. J., Feb. 3, 1911.

R. Floyd Clarke, Esq., New York City.

DEAR SIR: Yours of the 31st ultimo in re Charlton, with enclosures, duly received. The Statute of March 10, 1908, restricting appeals in habeas corpus proceedings, to which you refer, is not applicable to the Charlton case. The process by virtue of which Charlton was apprehended did not issue out of a state court. Judge Blair did not act as a court, nor under any state authority, but as a magistrate under the Extradition Act.

The appeal in the Charlton case was allowed, not under the habeas corpus act, but under section 5 clause 5 of the act of March 3, 1891, establishing circuit courts of appeals.

The certificate and order forwarded me as substitutes for those now on file, are returned herewith.

However, if you are fearful that this is not the right view, that the United States Supreme Court may disagree with me in this behalf, you may use this letter as a certificate of probable cause for an appeal, as I think it is a proper case for review.

Very truly yours,

JOHN RELSTAB.

Dict.

603 United States Circuit Court, District of New Jersey. In re Porter Charlton. Letter from Judge Rellstab to R. Floyd Clarke. Filed February 14, 1911. H. D. Oliphant, Clerk.

604 *Clerk's Certificate.*

UNITED STATES OF AMERICA,  
*District of New Jersey, ss:*

I, Henry D. Oliphant, Clerk of the Circuit Court of the United States, for the District of New Jersey, do hereby certify that the foregoing is a full, true and complete transcript of the record in the case of "In the matter of the Application of Paul Charlton for a writ of habeas corpus and a writ of certiorari in the pending proceedings entitled 'In the matter of the application for the Extradition of Porter Charlton under the Treaty between the United States and Italy,'" as the same remains of record and on file in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of said Court at Trenton, in said District, this Twenty-third day of February, nineteen hundred and eleven.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

H. D. OLIPHANT, *Clerk.*



605 [Endorsed:] United States Circuit Court, District of New Jersey. In the Matter of the application of Paul Charlton for a writ of habeas corpus and writ of certiorari in the pending proceedings entitled "In the matter of the application for the Extradition of Porter Charlton under the Treaty between the United States and Italy." Transcript of record.

606 Supreme Court of the United States, October Term, 1912.

**No —.**

PAUL CHARLTON, as Next Friend of PORTER CHARLTON, Appellant,  
against  
GUSTAVO DI ROSA, Vice-Consul of the Kingdom of Italy in the  
United States of America, et al., Respondents.

It is hereby stipulated between the parties to the foregoing appeal, pursuant to Subdivision 9 of the United States Supreme Court Rule No. 10, that the United States Supreme Court Clerk shall print as a part of the record on the appeal in this case, in the place and stead of Exhibits S-3 and S-4, the following index summary of said Exhibits S-3, original, and S-4, translation, attached hereto and marked "Exhibit X."

In consideration thereof, the appellant stipulates that he will raise no question on this appeal as to the sufficiency in the proofs before the Magistrate of the following facts, namely:

That the crime of murder had been committed in Italy; that the said Porter Charlton was a person found within the jurisdiction of New Jersey and of the United States after the commission of said crime and is the person named in said Exhibit- S-3 and S-4 and charged with such crime, and that the evidence presented before the Magistrate was sufficient prima facie proof to establish the commission of such crime and the criminality of said Porter Charlton; and the following assignments of error are withdrawn, namely:

607 Assignment of Error No. 6 and so much of the objection made under Assignments of Error No. 39 and 41 as is founded upon the absence of a warrant or the absence of copies of depositions upon which the warrant issued,—this stipulation being made without prejudice to the issues of law raised on the other assignments of error herein and without prejudice to the claim made by Charlton that Italy's demand for extradition in this case is a demand not under the treaty but under the comity of International law.

It is expressly stipulated that this stipulation is made only for the purpose of the appeal to the United States Supreme Court in the foregoing entitled case and is not to be used in any other action or proceeding.

Dated December 31, 1912.

R. FLOYD CLARKE,  
*Attorney for Appellant.*  
PIERRE P. GARVEN,  
*Attorney for Respondent.*

[On left margin:] Original for filing in U. S. Sup. —.

608

## EXHIBIT X.

Agreed summary of Exhibit S-3, being the original copy in Italian of proceedings of the Civil and Penal Tribunal at Como, and Exhibit S-4, being translation of the same into English, as summarized in the following English summary thereof:

Year 1910.

No. 1-2-3.

Civil and Penal Tribunal of Como.

No. 860 of the Prosecutor's Ledger.

No. 601 of the Ledger of the Inquiring Office.

Penal Proceedings against Porter Charlton, son of Paul, from New York, Charged with the murder of his own wife, Mrs. Mary Scott Crittenden.

609

Year 1910.

No. 1.

Civil and Penal Tribunal of Como.

No. 860 of the Prosecutor's Ledger.

No. 601 of the Ledger of the Insuiring Office.

Penal proceedings against Porter Charlton, son of Paul, from New York, charged with the murder of his own wife, Mrs. Mary Scott Crittenden.

Volume of the informations and affidavits and warrant for the arrest of Charlton.

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Civil and Penal Tribunal of Como.

No. 860 of the Prosecutor's Ledger.

No. 601 of the Ledger of the Inquiring Office.

Penal proceedings against Porter Charlton, son of Paul, from New York, charged with the murder of his own wife, Mrs. Mary Scott Crittenden.

Volume containing affidavits of experts, photograph of the victim and planimetric map and prospect of the place where the crime was committed.

*Index.*

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No. 3.

Civil and Penal Tribunal of Como.

Circuit — of Assise of Como.

No. 860 of the Prosecutor's Ledger.

No. 601 of the Ledger of the Inquiring Office.

Volume containing the sworn depositions of the witnesses.

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612 [Endorsed:] 232/22551. Supreme Court of the United States. Paul Charlton, as next friend of Porter Charlton, Appellant, vs. Gustavo di Rosa, Vice Consul of Kingdom of Italy, etc., Respondents. (Original.) Stipulation as to printing of record. Due service of — is hereby admitted — day of — 19—. — — attorney for ——. R. Floyd Clarke, attorney for appellant, No. 37 Wall street, Borough of Manhattan, city of New York, N. Y.

613 [Endorsed:] File No. 22,551. Supreme Court U. S. October Term, 1912. Term No. 232. Paul Charlton, as the next friend of Porter Charlton, Appellant, vs. James J. Kelly, Sheriff, etc., et al. Stipulation as to printing record. Filed January 8, 1913.

Endorsed on cover: File No. 22,551. New Jersey C. C. U. S. Term No. 232. Paul Charlton, as the next friend of Porter Charlton, appellant, vs. James J. Kelly, sheriff of Hudson county, State of New Jersey, and Gustavo De Rosa, vice-consul of the Kingdom of Italy in the United States of America. Filed March 2d, 1911. File No. 22,551.



Office Supreme Court, U. S.  
FILED.

MAR 17 1913

JAMES H. MCKENNEY,

CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 232.

PAUL CHARLTON, as the next friend of PORTER CHARLTON,  
*Appellant,*

*vs.*

JAMES J. KELLY, Sheriff of Hudson County, State of New Jersey,  
and GUSTAVO DE ROSA, Vice-Consul of the Kingdom  
of Italy in the United States of America,  
*Respondents.*

## BRIEF FOR APPELLANT.

R. FLOYD CLARKE,

*Attorney for Appellant.*

R. FLOYD CLARKE,

WILLIAM D. EDWARDS,

*Of Counsel.*





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**Supreme Court of the United States,**

**OCTOBER TERM, 1912.**

**No. 232.**

**PAUL CHARLTON, as the next friend  
of Porter Charlton,  
Appellant,**

**vs.**

**JAMES J. KELLY, Sheriff of Hudson  
County, State of New Jersey, and  
GUSTAVO DE ROSA, Vice Consul of  
the Kingdom of Italy in the  
United States of America,  
Respondents.**

**BRIEF FOR APPELLANT.**

**PART I.**

A CONCISE ABSTRACT OR STATEMENT OF THE CASE PRESENTING  
SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH  
THEY ARE RAISED.

This is an appeal from the final decision of the Judge of  
the United States Circuit Court for the District of New Jer-  
sey, discharging the writ of *habeas corpus* granted on petition  
herein.

**Facts.**

On June 24, 1910, before Hon. JOHN A. BLAIR, one of the  
judges of Hudson County Court of Oyer and Terminer, a  
court of superior jurisdiction, sitting as the United States

Magistrate under Section 5270 of the U. S. Revised Statutes, a complaint was filed by Gustavo de Rosa, Assistant Vice-Consul of the Kingdom of Italy in the United States for the jurisdiction of the State of New Jersey, charging Porter Charlton, an American citizen, with the commission of the crime of murder at Como, Italy, on the 7th day of June, 1910, and as being a fugitive from justice in this country, and demanding a warrant and commitment under the U. S. Revised Statutes (*Record, p. 21*). Thereupon and on the 24th day of June, 1910, said Porter Charlton was arrested on the foregoing charge and committed to the Hudson County Jail by order of the court (*Record, p. 18*).

From that day to this said Charlton had since been in said prison.

Adjournments were had of said proceeding from June 24, 1910, to September 21, 1910, *more than forty days from the date of the arrest* when the hearing was had (*Record, p. 87*).

Thereafter the magistrate, on or about the 14th day of October, 1910, filed his decision in said matter (*Record, p. 113*), under which the accused was remanded to the Hudson County Jail, and the formal final commitment on said decision was signed on the 15th day of October, 1910 (*Record, p. 19*).

Thereupon the Magistrate certified the record in said case and transmitted the same to the office of the Secretary of State on or about the 3d day of November, 1910.

On the hearing in support of the charge the prosecution presented:

1st. Admission on the record as to the identity of prisoner and of the deceased (*Record pp. 35 & 88*).

2nd. Proof of the filing of a complaint under the statute by Gustavo de Rosa, First Assistant Vice Consul of Italy in New York City. (*Record p. 35, Plaintiff's Ex. S1. Rec. p. 115-117*).

3rd. A certificate (*the mandate*) signed by the Secretary of State of the United States, attesting that a requisition had been made by the government of Italy to secure the preliminary arrest of a person charged with a crime. (*Record, p. 39, 40; Pltffs. Ex. S2, Rec., p. 117, 118*).

4th. The dossier received from Italy, containing alleged authenticated copies of the warrant of arrest and of the depositions, etc., relating to the crime. This was first presented to

the Court untranslated, August 11, 1910. (*Record*, pp. 37, 90). It was taken back by the Consul to be translated, and was again presented, with the translation, at the hearing on September 21. (*Record*, pp. 37, 38, 94, 95.)

Objection was taken on the ground that the certificate was insufficient under the act (*Record*, pp. 37, 95) and exception. This has since been waived; see stipulation (*Rec.*, 228); that it was not filed within the forty days required by the statute (*Record*, pp. 42, 43, 95); that it was not accompanied by the proper formal demand for the extradition of the prisoner from the Italian Government, as required by the treaty, within the forty days or otherwise (*Record*, pp. 43, 95).

The objections to the certificate were overruled and exception taken by defense (*Record*, pp. 43, 95).

The court then admitted the dossier, subject to the question of the forty days' clause. On argument, the court held the question for future decision (*Record*, pp. 45, 96).

5th. Proof as to the arrest of the prisoner in Hudson County, New Jersey, on June 23d, 1910, on the arrival of the steamer "Princess Irene" (*Record*, pp. 44, 96).

The court then admitted the dossier in evidence and allowed exception to the defense (*Record*, pp. 45, 99), both as to the dossier and its translation.

Thereupon the defense moved to dismiss on eight grounds, fully set forth at page 46 of the record.

These grounds were repeated on the motion to dismiss at the close of the case; see *Rec.*, p. 111 and *infra*, p. ; for the full statement of them.

The Motion to dismiss was denied and the defendant excepted (*Record*, pp. 46, 98, 99).

The defense thereupon opened its case by putting on a witness to prove the insanity of the defendant continuously from the date of the crime down to the hearing (*Record*, p. 47; *Record*, p. 106, folio 336).

On objection from the prosecution, evidence of that character was excluded, and the defense excepted (*Rec.*, pp. 47-50; *Rec.*, p. 107).

The offer of the defense as to the insanity evidence is contained in the record (pp. 50-54; *Record*, pp. 101 to 107).

The court ruled that evidence of insanity was incompetent, and the defendant excepted (*Record*, pp. 54, 107).

The defense then introduced volumes of the Congressional Records and the United States Foreign Relations of 1890 to 1894, and proved the diplomatic correspondence with reference to the following cases, namely (*See Record, pp. 55, 108*).

FIRST. The Paladini case, in 1888, mentioned in note of Mr. Blaine to Baron Fava, June 23, 1890, U. S. For. Rel., 1890, pp. 559, 560, inc. (*See Record, pp. 55, 108*). Defendant's Exhibit B attached to record (*Rec., pp. 121-130*).

SECOND. The Bevivino and Villela case by Baron Fava's letter to Mr. Blaine of April 20, 1890 (*Rec., pp. 55, 108*), and Exhibit A attached (*Rec., pp. 118-120*), and by Mr. Blaine's letter to Baron Fava, June 23, 1890, above mentioned (*See Record, pp. 55, 108*) and defendant's Exhibit B attached (*Rec., pp. 121-130*), and a certified copy of the letter of Baron Fava to Mr. Blaine dated July 3, 1890 (Deft's Ex. C) (*Record, p. 130*).

THIRD. The case of Delzoppo and Rinaldi, U. S. Foreign Relations of 1894, pp. 370, 373 (*Rec., pp. 55, 108*), Deft.'s Ex. D. attached. Letter of Edwin F. Uhl to American Minister in Italy, dated January 26, 1894; letter of Mr. MacVeagh to Mr. Gresham, April 23, 1894; letter of Mr. MacVeagh to B. Blanc, April 4, 1894; letter of Baron Blanc to Mr. MacVeagh, April 9, 1894; Mr. Uhl to Mr. MacVeagh, April 24, 1894 (*Rec., pp. 131-133*).

FOURTH. The DiBlasi case. Letter of Mr. Edwin F. Uhl, Acting Secretary of State, dated February 18, 1894, and letter of Hon. John Hay, Secretary of State, to the Governor of Massachusetts, February 11, 1899, not published—certified copy (*Record, pp. 55, 108, Defendant's Exs. E and F, Rec., pp. 108, 109*).

FIFTH. The Italian Penal Code of 1890, with title page and proclamation and Article 9 thereof, with translation (*Record, pp. 57, 58, 110, Deft.'s Ex. G., Rec., pp. 133, 110, 137*).

Article 9 of the Italian Penal Code reads :

"9 : The extradition of a citizen is not permitted"  
(*Record, p. 57*).

The fact was spread upon the record that Porter Charlton, the defendant, was born at Omaha, Neb., September 27, 1888, born of American parents, American ancestry; that he was a citizen of the United States, and that he voted in the New



York Mayoralty election in November, 1909 (*Record*, pp. 58, 59 ; *Rec.*, p. 111).

The State waived further proof, but alleges the facts irrelevant and immaterial (*Record*, pp. 58, 111).

At the close of the case the defendant moved for dismissal on the following grounds :

MR. CLARKE : *We move to dismiss on the following grounds :*

1st. That while the mandate of the Secretary of State is produced, there is no proof of the form in which the original requisition for the preliminary arrest was made upon the American Government, nor is there any copy of such original requisition presented.

2d. There is no proof that any copy of the warrant for his arrest in Italy accompanied the original requisition for extradition, nor is there any proof of any copy of any such warrant, or of the warrant of arrest.

3d. There is no proof that any copy of the depositions on which the warrant of arrest was issued in Italy accompanied the requisition, nor any proof that any copy of the depositions on which the warrant of arrest was issued in Italy accompanied such requisition.

4th. There is no proof that any formal demand for the extradition of Porter Charlton, supported as above provided, and together with the documents above provided, was made within forty days after the arrest, or was made at any time prior to this hearing, nor is there any proof of any formal demand for the extradition of Porter Charlton as required by the treaty and the Act of Congress.

5th. There is no proof that any copy of the depositions on which the warrant of arrest was presented to the Secretary of State or presented to this Court within the forty days required by the treaty, or up to the time of this hearing, and that the complaint is not evidence of any of the facts stated in it, and in any event, on its face shows no compliance with the requirements of the statute or the treaty.

6th. That the burden of proof is on the prosecution in a proceeding of this kind to show that all the requirements of the treaty have been complied with and that all such documents have been presented within the time required to the Secretary of State or to this Court, and that such documents should be presented to the Secretary of State and by him for-

warded to this Court for action, and that the prosecution has failed to show or make proof that any such documents have been presented to this court or to the Secretary of State within the forty days required by the treaty, or up to the time of this hearing.

7th. That the documents required by the treaty have not been duly filed, made, entered or received by the United States Government, executive or judicial, within the forty days required by the treaty of 1884, or according to the treaty.

8th. That the treaty does not include citizens of the asylum countries by reason of the various actions of the diplomatic departments of both governments, and by reason of the Italian statute, Article 9, of the Penal Code of 1890.

9th. That Charlton, being a citizen of the United States, under the diplomatic correspondence which has taken place between the two governments respecting the construction of the treaty and of Article 9 of the Italian Penal Code of 1890, the treaty, so far as it applied to citizens of the asylum country, has been denounced and broken by Italy, and under the circumstances there is no jurisdiction in the Courts or the Executive to extradite, there being no obligation, under the treaty, to extradite.

MR. CLARKE: And on the further ground that the treaty does not apply to citizens of the United States and that the court has no jurisdiction because of that fact, we ask his discharge for those reasons.

Testimony closed (*Rec.*, pp. 60, 112).

On Friday, October 14th, the Court rendered its decision, denying the motion and committing the prisoner (*Rec.*, pp. 113, 114).

Defense takes exception (*Rec.*, pp. 113-115).

Warrant of commitment is at page (*Rec.*, p. 115).

Thereafter this proceeding on *habeas corpus* was begun by petition of Paul Charlton, the father, as next friend of Porter Charlton, on the 9th day of December, 1910, praying for writs of *habeas corpus* and *certiorari*, on which a writ of *habeas corpus* issued to James J. Kelly, Sheriff of the County of Hudson, State of New Jersey (*Record*, p. 15), and a writ of *certiorari* issued to the Hon. JOHN A. BLAIR, requiring him to return "a true transcript of all proceedings had and taken before the said Magistrate against Porter Charlton" (*Record*, pp.

16, 17) and a further writ of *certiorari* issued to the Hon. Secretary of State of the United States requiring him to return "a true transcript of all proceedings had and taken before the said magistrate against Porter Charlton under and pursuant to a warrant issued by said Magistrate" etc. (*Record*, pp. 14, 15).

The writs were returnable on the 19th day of December, 1910, at the United States Circuit Court, Capitol Building, Trenton, N. J. (*Record*, p. 16).

The Secretary of State in making his return to the writ of *certiorari*, simply certified "That the attached papers are a copy of the transcript of the proceedings had before the Honorable JOHN A. BLAIR, Court of Oyer and Terminer, Hudson County, New Jersey, in the matter of the application for the extradition of Porter Charlton, of the exhibits attached thereto and of the translation of the proceedings had in Italy" (*Record*, pp. 28, 29).

On the return day of the writs of *habeas corpus* and *certiorari* December 19, 1910 (*Record*, p. 24), the Sheriff produced the body, the Secretary of State returned under the writ of *certiorari* the certified copy of the transcript of the proceedings before the Magistrate and the Magistrate likewise returned under the writ of *certiorari* the transcript of proceedings before him.

An additional paper sent by the Secretary of State to the Clerk of the Court was, on application of the petitioner's counsel, diminished from the return of the writ of *certiorari*. This was the "formal demand" certified under date of December 17, 1910 (*Rec.*, pp. 26-28).

Thereupon on application of the Italian Government, a further writ of *certiorari* was issued (*Rec.*, p. 145) to bring up the said paper which was the alleged formal demand alleged to have been made on the United States Government within forty days from the date of the arrest.

This is the certified copy of the "formal demand" certified under date of January 3, 1911 (*Rec.*, pp. 149, 150).

This *certiorari* was opposed by the counsel for petitioner on the ground that the only matter properly before the court on the writs of *habeas corpus* and *certiorari* was the record of the proceedings before the magistrate (*Record*, p. 145; *Record*, 197-199).

The writ was granted in favor of the Italian Government and the motion on behalf of petitioner's counsel to the effect that if, against his opposition thereto, such further writ of *certiorari* was granted requiring any further return then without prejudice to his said opposition to the granting of said writ, he requested that the said writ be extended to requiring the said Hon. Secretary of State to furnish further documents, namely :

1. Diplomatic correspondence in the Charlton case.
2. Original requisition in that case.
3. Formal demand in that case, if any.
4. A certificate specifying the dates of their receipt, etc.
5. The correspondence between petitioner's counsel and the Secretary of State in regard to the matter (*Record*, pp. 145, 146).

Such application of petitioner's counsel was denied and the hearing of the *habeas corpus* adjourned (*Record*, p. 146).

On January 4, 1911, the Secretary of State having returned on the writ of *certiorari* issued on behalf of the Italian Government the copy of the formal demand certified January 3, 1911, under an order reciting the foregoing order, petitioner's counsel moved for and obtained a further writ of *certiorari* to the Secretary of State to furnish the five items above mentioned (*Record*, p. 147).

On the further writ of *certiorari* obtained by the Italian Government, the Secretary of State on January 4, 1911, returned the copy of the demand certified as of January 3, 1911, containing a mark of the date of its receipt (*Record*, pp. 148-150).

On the further writ of *certiorari* obtained by petitioner's counsel, the Secretary of State returned the diplomatic correspondence between Italy and the United States in the Charlton Case (*Record*, pp. 154 to 163 inc.), and also the correspondence between petitioner's counsel and the Secretary of State in regard to the Charlton Case (*Record*, pp. 164 to 175 inc.).

Thereupon the hearing took place before Judge RELLSTAB, of the United States Circuit Court for New Jersey, on the 23d day of January, 1911, and over the objection of the petitioner's counsel that there was no right to receive further evidence than the record before the magistrate, the further evi-

dence of the alleged demand served on the Secretary of State by the Italian Government within the forty days was put in on the part of the Italian Government.

The petitioner excepted and objected to the admission of this evidence (*Record*, pp. 197 to 200).

Thereupon the demand having been admitted, petitioner's counsel, without prejudice to his objection to the same, put in evidence the certified copy of the alleged demand, dated July 28, 1910, certified by the Secretary of State under date of December 17, 1910, which, although certified, contained no date of receipt or otherwise, and offered in evidence the entire diplomatic correspondence and correspondence between petitioner's counsel and the Secretary of State (*Record*, p. 200).

In respect to these matters the following proceedings were had :

" THE COURT : As to the return that was made on the order entered on the motion of the petitioner's counsel requesting the Secretary of State to forward certain correspondence, what is your contention ? As I gather it, you would not have requested that order were it not for the fact that the court had permitted the *certiorari* to issue on the motion of Mr. Garven.

MR. CLARKE : That is true, but I want the correspondence admitted since you have allowed the alleged formal demand in evidence.

THE COURT : Then you withdraw your objection. I understand that your objection relating to the correspondence is withdrawn.

MR. CLARKE : No, except as I have said, now I wish, if your Honor please, on behalf of the petitioner, to put in evidence the first certificate of the Secretary of State on the 17th day of December, certifying this document.

MR. GARVEN : Is that in response to your letter ?

MR. CLARKE : Yes, that is in response to my letter.

MR. GARVEN : We will not object to that.

The document being an alleged demand dated July 28th, 1910, and certified by the Secretary of State under date of December 17, 1910, was admitted in evidence and marked Petitioner's Exhibit No. 1 of January 23, 1911.

MR. CLARKE : I also offer in evidence the entire correspondence.

**THE COURT:** That is in the case, like all other proceedings. There is no use in having that specially marked.

**MR. GARVEN:** I understand that your Honor is not ruling upon the correspondence now. We object to the correspondence that has been forwarded by the Secretary of State in response to the order issued on motion of the petitioner's counsel.

**THE COURT:** I will admit them and pass upon their relevancy later. I want a full argument upon everything that is relevant in the mind of counsel when they make their argument." (*Record, pp. 200-201.*)

*On the record so presented the questions involved are the following:*

### **The Questions Presented.**

**1:** Under the Extradition Treaty between the United States and Italy of 1868, does the word "persons" as used in the identical reciprocal covenant therein contained for the extradition of persons on demand include a citizen of the asylum country?

*(See assignments of error 4th, Record, p. 185; 13th and 17th, Rec., p. 194; 22nd, Rec., p. 196.)*

**2:** If the word "persons" includes "citizens" of the asylum country under the diplomatic correspondence between the two countries establishing a clear admitted breach of a covenant on the part of Italy and the passage by Italy of its penal code forbidding extradition of Italian subjects subsequent to the passage of said treaty, and the refusal of Italy on all occasions to comply with the request of this country demanding extradition of Italian subjects committing crimes here and fleeing for asylum to Italy, and the abandonment by this country of any further attempt to obtain extradition in such cases even though requested by Governors of States, can a citizen of the United States, accused of committing a crime in Italy and found as an alleged fugitive from justice in this country, be, under the provisions of said treaty and the laws of the land, extradited by the mandate of the Executive?

*(See assignments of error 3rd and 5th, Rec., p. 185; 8th, Rec., p. 193; 12th, Rec., p. 194; 14th to 19th, Rec., p. 195; 23rd, 24th, 25th, 26th, Rec., p. 196.)*

**3 :** On a hearing before the magistrate in extradition proceedings of this character, is proof on behalf of the accused of insanity at the time of the commission of the alleged offense and of insanity at the time of the hearing competent, and is the magistrate's rejection of the same error?

(See assignments of error 7th, Rec., p. 186 ; 20th, Rec., p. 195 ; 21st, Rec., p. 196.)

**4 :** Assuming a citizen of this country under the circumstances mentioned in No. 2, could be extradited by the mandate of the executive, is it obligatory upon the Italian Government, in prosecuting these proceedings—the hearing before the Magistrate having occurred over forty days after the arrest,—to prove that a formal demand was duly made within the forty days required by the treaty for the surrender of the prisoner?

(See assignments of error, 9th, 10th, 11th and 12th, Rec., p. 193 ; 27th, 29th and 30th, Rec., p. 197.)

**5 :** In an extradition proceeding of this character on *habeas corpus* and writ of *certiorari* to review the decision of the magistrate, is it competent to hear the case on any evidence other than the record before the committing magistrate?

(See assignment of error 33rd, Rec., p. 197, etc.)

**6 :** Assuming that citizens of this country under the circumstances mentioned in No. 2 can be extradited by the mandate of the executive, and assuming that the alleged formal demand set out in the record herein was presented by Italy to this government within the forty days, is such alleged formal demand, in view of the diplomatic correspondence preceding it and which is referred to in it, a proper demand within the requirements of the treaty, or is it simply a request under the comity of international law?

(See Assignments of Error, 31st and 32nd, Rec., p. 197.)



## PART II.

A SPECIFICATION OF THE ERRORS RELIED UPON, STATING AS PARTICULARLY AS MAY BE AND IN WHAT THE DECREE IS ALLEGED TO BE ERRONEOUS AND IN RESPECT TO THE ERRORS ALLEGED AS TO THE ADMISSION AND REJECTION OF EVIDENCE, QUOTING THE FULL SUBSTANCE OF THE EVIDENCE ADMITTED OR REJECTED.

The errors relied upon are stated in detail in the assignment of errors (*Record*, p. 184, 197).

They are all included in the six questions set forth in Part I. and may be summarized as follows :

**1 : Error** in holding that the word "persons" in the treaty means "citizens" of the asylum country.

(See assignments of error, 4th, *Rec.*, p. 185 ; 13th and 17th, *Rec.*, p. 194 ; 22nd, *Rec.*, p. 196.)

**2 : Error** in holding that, under the facts and circumstances of this case, including the treaty, the diplomatic correspondence between the two countries establishing a clear admitted breach of a covenant on the part of Italy and the passage by Italy of its penal code forbidding extradition of Italian subjects subsequent to the passage of said treaty, and the refusal of Italy on many occasions to comply with the request of this country demanding extradition of Italian subjects committing crimes here and fleeing for asylum to Italy, and the abandonment by this country of any further attempt to obtain extradition in such cases even though requested by governors of states, a citizen of the United States, accused of committing a crime in Italy and found as an alleged fugitive from justice in this country, can be extradited by action of the executive branch of the government.

(See assignments of error 3d and 5th, *Rec.*, p. 185 ; 8th, *Rec.*, p. 193 ; 12th, *Rec.*, p. 194 ; 14th, 15th, 16th, 17th, 18th, 19th, *Rec.*, p. 195 ; 23d, 24th, 25th, 26th, *Rec.*, p. 196.)

**3 : Error** in holding that on a hearing before the magistrate in extradition proceedings of this character, proof on behalf of the accused of insanity at the time of the commis-

sion of the alleged offense and of insanity at the time of the hearing is incompetent, and that the magistrate's rejection of the same is not error.

(*See assignments of error 7th, Rec., p. 186.*)

(*As to insanity at the time of the alleged crime, see assignment of error 21st, Rec., p. 196.*)

(*As to insanity at the time of the hearing, see assignment of error 20th, Rec., p. 195.*)

**4 : Error** in holding that when the hearing on the examination of a prisoner under said treaty takes place more than forty days after the arrest and no proof is made as to the presenting of a formal demand within the forty days as required by the treaty that the prisoner is not then and there entitled to his discharge pursuant to the terms of the treaty.

(*See Assignments of error, 9th, 10th, 11th and 12th, Rec., p. 193 ; 27th, 29th, 30th, Rec., p. 197.*)

**5 : Error** in holding that evidence other than the record before the committing magistrate was competent to be heard on the hearing on the *habeas corpus* proceeding.

(*See Assignment of Error 33rd, Rec., p. 197.*)

**6 : Error** in holding that the alleged formal demand in this case under the facts and circumstances developed in this case of the prior diplomatic correspondence between the governments referred to in such demand, is the formal demand required by the treaty and not merely a request under the imperfect obligation of international law.

(*See Assignments of Errors 31st and 32nd, Record, p. 197.*)

In the foregoing specifications, only two, namely, the 3d and 5th, cover the admission or rejection of evidence.

The 3d covers the rejection before the Magistrate of the evidence as to insanity, and the 5th covers the admission before the Judge on the *Habeas Corpus* and *certiorari* hearing of other evidence beyond the record before the Magistrate, namely, the "formal demand" over the objection and exception of the prisoner's counsel and the further correspondence diplomatic and otherwise offered in connection with it.

They are accordingly set forth at length and are as follows :

**" 3 : Error** in holding that on a hearing before the magistrate in extradition proceedings of this character, proof on behalf of the accused of insanity at the time of the commission of the alleged offense and of insanity at the time of the hearing is incompetent, and that the magistrate's rejection of the same is error."

*(See Assignment of Error 7th, Rec., p. 186.)*

*(As to insanity at the time of the alleged crime, See Assignment of Error 21st, Rec., p. 196.)*

*(As to insanity at the time of the hearing, See Assignment of Error 20th, Rec., p. 195.)*

" 7th : In holding that, at the hearing of the matter of extradition of Porter Charlton before the Judge of the Court of Oyer and Terminer, of Hudson County, New Jersey, sitting as a Federal Examining Magistrate under acts of Congress, certain witnesses, qualified by age, knowledge and experience, physically present in court, who were offered to be sworn on behalf of the accused for the purpose of proving that the accused was insane on the date when the alleged crime was alleged to have been committed, and on the date of said hearing, to wit, September 21, 1910, were properly refused to be allowed to be sworn, and any such evidence as to the insanity of the accused at the time of the commission of the alleged crime or at the date of the hearing was properly refused to be introduced."

The full substance of such evidence so rejected by the Court and to which exception was taken as aforesaid being as follows :

MR. EDWARDS, of counsel for the prisoner :

" In addition to this, we propose to show, as a reason why the extradition should not be granted, that on the day of the date of the commission of the crime in Italy, the prisoner, Porter Charlton, was of unsound mind to such extent that he was unable to distinguish between the right and wrong of the deed for which he was committed ; in other words, that under our law, he was insane and continued in that condition of mind up to the time of his arrest. And we propose to give expert evidence on that subject, and other evidence in support of the

expert evidence as to his previous life, and physical antecedents and ancestry.

" We submit that we should put in the documentary evidence last and the insanity evidence first, as the witnesses are here.

" We call Paul Charlton.

" (Objected to.)

" MR. EDWARDS : We offer to prove by the testimony of Mr. Paul Charlton, the father of defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime, in the month of June, in Italy, this defendant was of unsound mind. That at the time of the commission of the alleged crime, he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit : that at the time of the doing of the act complained of, this defendant was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

" MR. GARVEN : It is quite evident that counsel has admitted the commission of the crime by Porter Charlton.

" We object to this witness testifying to the insanity of the defendant on the ground that your Honor is sitting merely as a committing magistrate, and under the law of this State, a committing magistrate will not allow the defense to go into the case on a preliminary hearing on a complaint, except that the defendant might make a statement, not under oath.

" And secondly, that it is inadmissible to plead insanity in this proceeding.

" And on these grounds we object to the evidence."

\* \* \* \* \*

Thereupon while said court was sitting upon said day in the hearing of the above matter, Mr. Edwards, of counsel for the defendant, called a witness on behalf of the defendant to testify as to certain facts material to the defense in said pro-

ceeding, said witness being competent by age and knowledge to give such testimony, and being then physically present in said court, and being presented at the bar of said court to be sworn, for the purpose of giving such testimony; and, before such witness was sworn, as above, an objection having been interposed on the part of the State to the introduction of any evidence of the insanity of the defendant.

And counsel for the defendant having stated orally at the bar of the court, that he proposed to offer by the testimony of the witness then at the bar of the court and offered to be sworn, and by the testimony of other witnesses then physically present in the court, competent by age, experience and knowledge and ready to be sworn, and to testify in this proceeding, and by this testimony to prove that the defendant, at and before the time of the offense alleged to have been committed by the defendant was committed, and at the time of the arrest of the defendant in Hudson County, New Jersey, to wit: on June 23rd, 1910, and at the time said offer was made, to wit: on September 21st, 1910, the said defendant was, and is, insane, and irresponsible, for his acts, and further offered to prove by the testimony of Paul Charlton, the father of the defendant, and by other members of the family who have known this young man for many years, by expert physicians and alienists who have examined this defendant since he has been in custody, that at the time of the commission of this alleged crime in the month of June in Italy, this defendant was of unsound mind, that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense with which he has been charged, and we intend to conform with the tests of responsibility laid down by our courts, to wit: that at the time of the doing of the act complained of this defendant was of such unsound mind and was so insane as to be unable to distinguish between the right and wrong of that act, and that this condition existed some time previous to the commission of the alleged crime and continued to exist up to and including the time when he was arrested.

And the court, at said place and upon said date, having duly considered said offer of testimony on behalf of defendant, and the objection to the reception thereof, interposed on be-

half of the State, having sustained the objection, and declined to permit the introduction thereof, or the production and swearing of said witnesses on behalf of the defendant, as to such facts or any of them; to which action and ruling of the court due exception was made by counsel on behalf of the defendant, and such exception having been duly noted on the records of the court; allowed and sealed.

JOHN A. BLAIR,

Judge (SEAL).

And the court having granted, in open court, permission for counsel for defendant to present a statement and schedule of the facts so offered to be proven, on behalf of defendant, by said witnesses who were then physically present in court, and competent, ready and willing to testify thereto, in compliance with said permission, there is submitted for insertion in the records of this court, in the hearing of this case, a statement and schedule of the said facts so offered to be testified to, introduced and proven on behalf of the defendant, as follows :

That the defendant was born, and now is an American citizen; that he was born at Omaha, Nebraska, within the United States, on September 21st, 1888; that at the time of his birth both his father and his mother were American citizens; as a child he was normal, physically and mentally, and although physically very active and adroit, apt and skillful as an athlete, he was never physically robust or strong.

As a child his temper was usually good; he was amiable, gentle, fond of company, of his family and his companions, and was well liked by every one. From his early childhood he was subject to fits of extreme rage, upon provocation and infrequently. On one occasion, when he was of the age of fourteen years, the horse he was riding took fright and ran away with him, and when he brought the horse in both horse and rider were in a state of complete exhaustion—the horse from overriding and from laceration of his mouth by a severe bit, and of his sides and flanks from severe and cruel spurring. The boy was in a hysterical rage, trembling violently and crying, and begging to be allowed to take further vengeance upon the horse, because he had been unruly, and he had to be taken from him by force. Later, during his life in boarding

school, on occasions of athletic contests on several occasions he became violently enraged, and required to be restrained by force from committing reprisals on his opponents. He had, during all his life, spent much time in outdoor sports and exercise, until he came to New York in December, 1908, and took a place in a bank, where his duties soon became so onerous as to require (in his judgment) constant application at a desk from 9 A. M. to 6 P. M. and frequently until midnight, and this usually for the whole seven days of the week. In September, 1909, his associates and family began to notice a radical change in him. He became very thin, his face was grey and drawn, his temper became uncertain, and he was resentful of suggestion or control to the verge of extreme rudeness; generally the change from evenness and courtesy was so pronounced as to be noticed by everyone with whom he came in contact. This change, in those regards, became more and more pronounced, until he was insubordinate to the directors of his employers and repudiated the suggestion or control of his father, or the advice of his brother and friends. He became solitary, morose, uncommunicative. When he left his work he would lock himself alone in his lodgings and would read works of imagination and poetry. He ceased to visit friends, and refused offers and invitations for entertainment in their company.

Early in the year 1910 he developed a persistent hacking cough, expectorated almost constantly, his shoulders were drawn in, he was stooped and emaciated. He ridiculed, with resentment the endeavors of his family to induce him to take medical advice, and to take exercise in the open air, and reduce his hours of work. His condition became alarmingly worse between his father's visits to him on February 1st and March 6th, 1910; on the latter date he was in a state approaching physical collapse, his breathing was oppressed, and his sputum tinged with blood. He was put to bed, and consented to consult a physician the next day. After examination, it was found, from his sputum and an X-ray photograph, that he was suffering from incipient tuberculosis, and he was advised that life in the open air, with practically hospital surroundings, would be necessary to save his life. Arrangements were at once made for the termination of his employment on April 1, and permission had been obtained for his admission to



the tuberculosis hospital of the United States Army, at Ft. Bayard, New Mexico, to which he gave ready assent.

Coming to New York to see him to make final arrangements, his father met him at the Twenty-third Street Ferry and told him he was in a great hurry to keep a dinner engagement. On the way from the ferry in a cab, he told his father that he had been privately married, on March 12th, 1910, to a woman slightly older than he, who had been forced to divorce her husband, but who was the brightest, prettiest, most charming lady in the world.

Instead of driving to the place of his father's engagement, the cab was driven to "The Woodward Annex," an apartment hotel at Fifty-fifth Street and Broadway, where the defendant and his wife, Mary Scott Castle Charlton, were then living. Mrs. Charlton was, apparently at least, twice the age of her husband, was vivacious, and had the appearance of intense vitality, in marked contrast to her husband, who was stooped, with drawn face, a constant irritating cough and was noticeably under the domination of his wife. After a short interview, the father proceeded to his engagement and returned to the hotel about midnight.

At the interview which followed, the father made respectful inquiry of the wife in relation to her family, her life and career, including her former marriage, which had been dissolved by divorce, and also as to the resources of the husband and wife, the husband having no private means—except as furnished by his father—and being out of employment.

These natural and necessary questions were resented by the wife, and the interview terminated in about half an hour in her withdrawal with her husband, in a highly hysterical condition. Offers of assistance by the father were refused in violent words by the husband and wife.

Similar offers were refused on the following morning, as were invitations by telephone from the father to the wife and husband to lunch and dine with him on that day.

Mr. and Mrs. Charlton did, however, dine on the evening of March 29, 1910, at the Hotel Lafayette, 9th Street and University Place, with the father and a gentleman friend, at which time the wife drank, without moderation, white wine, and after dinner, furnished at her request, two large goblets of "dropped absinthe" in ice.

The father did not again see Mr. and Mrs. Charlton, or either of them, prior to their sailing from New York for Genoa on the SS. "Duca D'Aosta," on Saturday, April 16, 1910.

The father did, however, receive from his son on or about April 6, 1910, a letter so full of foulness and abuse that the father destroyed it unread, except a glance through it to see its purport and phraseology.

The latter were entirely unlike any diction, oral or written, that the son had ever been known to use; he had hitherto been a purist in the use of language, and extremely refined in both conversation and correspondence, while the letter was full of phrases of the gutter, such as would be used by the most abandoned person. Aside from abuse of the father the letter contained the most extravagant eulogies of the wife.

A similar letter, equally strange and foul, was received by the father from the son in Italy about May 16th, 1910, which was likewise destroyed unread except for a glance to learn its purport and phraseology, which like that of the former letter, was abusive, foul, insulting and utterly, radically, different in those qualities and in its rambling incoherence, from anything his father had ever known him speak or write. Both the letters bore convincing internal evidence of having been dictated rather than originated by the writer.

He wrote two similar letters to one of his brothers—one before he sailed for Italy and one on or about May 18th, 1910, both full of abuse of his family and eulogies of his wife. Both these letters were destroyed after being glanced over to see if they contained any important statement as to his health or plans, which neither of them did.

These were the only communications received by his family after he sailed for Italy and up to the day of his arrest at Hoboken on June 23d, 1910. His father saw him at Police Headquarters, Hoboken, N. J., on the night of his arrest, when there were also present: Mr. Hayes, Chief of Police; several officers, Recorder McGovern, by whom he had been committed; Dr. William J. Arlitz, the police surgeon; R. Floyd Clarke, Esqre, his counsel, and Robert Charlton, his brother.

On this occasion he was in a state of hysterical exaltation; he refused to greet or speak to his father; had no apparent appreciation of the gravity or seriousness of his situation; was incoherent in his statements, and talked freely in a

rambling, disconnected manner to all the persons present, and was palpably, to any observer, not of sound mind.

When he arrived at the dock in Hoboken he left the steamer, carrying two suit cases, one of which was marked with the initials "P. C.," and submitted them to the examination of the customs officials, although they contained toilet articles and wearing apparel marked with his name or initials, letters addressed to him, and visiting cards bearing his name.

His demeanor at the time of his arrest, preliminary examination, etc., was such as to convince the Police Surgeon that he was demented.

#### *Family History of Porter Charlton.*

1. The maternal grandfather of the defendant died at the age of between 35 and 40 years, of chronic alcoholism.

2. The brother of the foregoing (No. 1), was a paranoic for years before his death and died in that condition.

3. The sister of the foregoing (Nos. 1 & 2), was a daughter afflicted with epilepsy, who died in epileptiform convulsions at the age of about 32.

4. The maternal uncle of defendant, now 51 years old, is of a stubborn and brutal nature; was educated as a chemist; became a pharmacist; wasted his estate on a low connection with a woman much older than himself; contracted drug habits and has lived an eccentric and immoral life since the age of 21 years; entirely cut off from associates of his own class.

5. A near relative of his mother's blood, now living, has had periodic explosions of attacks of epilepsy for many years.

6. A younger brother of defendant, at the age of 15 years, accidentally shot and killed a playmate to whom he was devotedly attached, but after his first paroxysm of grief—within three days—seemed to forget the accident; nor referred to it; has since gone about his daily life as if it not happened, and, so far as can be observed, has remained indifferent.

#### *Some Medical History of Mary Scott Castle Charlton.*

1. Within three years was confined in an institution in the City of New York, suffering from erotic insanity—uncontrollable desire for the society of men.

2. Within two years last past, and up to the time of her departure for Italy, was under the treatment of two physicians of the City of New York for alcoholism, and uncontrollable, hysterical outbursts of rage. On learning of her proposed marriage to defendant both physicians endeavored to have disclosure of these facts made to defendant, but were unsuccessful. The foregoing is important and material, as explaining the physical and mental condition of the defendant as disclosed to the alienists who have had him under observation since his arrest.

*Opinion of Physicians Experts in Mental Diseases.*

Defendant has been under the observation of Dr. William J. Arlitz, Hoboken, New Jersey, from the hour of his arrest on June 23, 1910, and of Drs. Allan McLane Hamilton and Edward D. Fisher since June 24, 1910.

They have singly and together, made frequent and exhaustive examination of the mental and physical condition of the defendant from the above dates until the present, and they are unanimously and strongly of the opinion that, *at the date of the crime alleged to have been committed by the defendant, and at the date of his arrest in the United States, and at the present date*, the defendant was and is, suffering from an exhaustive psychosis due to sexual excesses; that his moral sense is pathologically defective; that he is of unsound mind and liable to attacks of impulsive violence, which explosions are beyond his control and are due to hysterical stigmata and epileptiform seizures, during which he was not and is not responsible; that his whole condition shows a degree of weakmindedness, disregard for his personal safety, and liability to violent explosion at any time, which is to be looked for in a person of his constitutional mental weakness.

The said expert physicians and alienists who have examined the defendant since he has been in custody will depose that in their opinion this defendant, at the time of the commission of this alleged crime in the month of June in Italy was of unsound mind, and that at the time of the commission of the alleged crime he did not have the mental ability to discriminate between right and wrong with respect to the offense

with which he has been charged, and that in their opinion, conforming with the tests of responsibility laid down by our courts, this defendant at the time of the doing of the act complained of was of such unsound mind and was so insane as to be unable to distinguish between the right and the wrong of the act, and that this condition existed some time previous to the commission of the alleged crime and continued up to and including the time when he was arrested.

These physicians recommend that he should be taken to a hospital for the insane, and there kept indefinitely, as he is at any time likely to be a menace to society.

The defendant, by his counsel offers to prove the facts, and each of them, set forth in the preceding schedule or statement, by the competent, relevant and material testimony of witnesses now physically present in court, and qualified by age, knowledge and experience to testify to the same, and each of said facts, and to the results and conclusions and opinion necessarily and legally following therefrom.

Thereupon the Court ruled :

THE COURT : I have reached the conclusion, on the subject of insanity as a defense in this matter that I will not hear it. I do not think we ought to go into the subject of the insanity of the defendant, and therefore overrule the offer of the defense.

Exception taken by defendant and allowed and sealed.

JOHN A. BLAIR, Judge (SEAL).

(*Rec.*, pp. 186 to 193).

The 5th specification :—

“ **5 : Error** in holding that evidence other than the record before the committing magistrate was competent to be heard on the hearing on the *habeas corpus* proceeding,” namely the admission in evidence of the alleged formal demand of July 28, 1910, certified under date of January 3, 1911, (See *Rec.*, p. 200), copy demand (*Rec.*, pp. 201-202). (See Assignment of Error, 33rd, *Rec.*, p. 197).

The allowance of this document in evidence over exception compelled petitioner's counsel to put in evidence the diplomatic correspondence between the Governments referred to in the demand and the correspondence between the Sec-

retary of State and the prisoner's counsel with reference to this alleged demand.

THE DIPLOMATIC CORRESPONDENCE IN THE CHARLTON CASE IN RELATION TO THE ALLEGED FORMAL DEMAND IS AS FOLLOWS.

"Telegram received.

NEW YORK, Dated June 15, 1910.

Rec'd. 12.16 P. M.

P. C. KNOX, ESQ., Secretary of State, Washington :

Italian police believe Charlton Porter, against whom a warrant of arrest has been issued for the murder of his wife at Moltrasio, has taken passage to United States.

I beg Your Excellency to have urgent orders issued to competent authorities of New York, Philadelphia, Baltimore, Galveston and other ports of entry for his arrest.

MONTAGLIARI,  
Italian Charge d'Affaires."  
(*Rec.*, p. 153).

June 19, 1910, Knox telegraphs to Montagliari that there is no provision of law which in the absence of treaty stipulations places at the disposal of the Federal Government any machinery for the purpose requested in his telegram (*Rec.*, p. 154).

[ " Translation ]

No. 987

ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., June 20, 1910.

MR. SECRETARY OF STATE :

I have the honor to acknowledge the receipt of and to thank your Excellency for the telegram received yesterday on the subject of the eventual arrest of Mr. Charlton.

It was not on the strength of the existing Treaty of Extradition that I had the honor to apply to Your

Excellency with a request that you kindly take measures for the eventual arrest of the said Charlton, as I presume that the Government of the United States would not grant the extradition of one of its citizens.

The case being that of the murder of an American woman in which the Department of State and the Ambassador of the United States at Rome had taken special interest, I had taken the liberty to ask Your Excellency kindly to cooperate in not letting the person charged with so heinous a crime escape punitive justice.

Accept, Mr. Secretary of State, the assurances of my highest consideration.

MONTAGLIARI."

(*Record*, p. 154.)

[ "Telegram Received.]

Index Bureau

June 24 2

9.20

1910

Dep't of State.

From NEW YORK, Dated June 23, 1910.

Rec'd 7.40 P. M.

HONORABLE P. C. KNOX,

Secretary of State, Washington.

Urgent. Porter Charlton, against whom Italian Government has issued warrant of arrest for murder of his wife at Moltrasio, on or about the seventh of June, has been arrested this morning at Hoboken, New Jersey, on landing of Princess Irene and has confessed his crime to local Chief of Police.

I beg your Excellency to kindly deliver Federal warrant pending arrival extradition documents, and to send it to me care of Italian Consulate, New York.

MONTAGLIARI."

(*Rec.*, p. 155.)



[Telegram Sent.]

" DEPARTMENT OF STATE,  
WASHINGTON, June 24, 1910.

MARCHESE PAOLO DI MONTAGLIARI, Charge d'Affaires of  
Italy, c/o Italian Consul, New York City, New  
York :

Referring to your note of June twenty and particularly to your telegram of June twenty-third in which you request a federal warrant, I have to say that the National Executive issues no federal warrant in extradition cases until the fugitive is surrendered. May I inquire if you are referring to the certificate or preliminary mandate referred to in Article two of the supplemental Extradition Convention of eighteen eighty-four? In view of the fact that Porter Charlton is understood to be an American citizen, as you indicate in your note of June twenty, I beg also to inquire whether or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your Government wishes to be understood as surrendering its view heretofore entertained and as being now willing to adopt as to cases which may hereafter arise between the two Governments, the view that the Extradition Treaties of eighteen sixty-eight eighteen sixty-nine and eighteen eighty-four between the United States and Italy require the surrender by each Government of any and all persons, irrespective of the nationality, who having been convicted for or charged with commission of any of the crimes specified in the treaty within the jurisdiction of one of the contracting parties shall seek an asylum or be found within the territory of the other, and further and specifically to inquire whether the Government of Italy now proposes as to all cases arising in the future to deliver to the Government of the United States under and in accordance with the Treaty provisions those Italian subjects who committing crimes in the United States take refuge in Italy.

KNOX."

(*Rec., pp. 155, 156.*)

" Index Bureau,  
 Jun-25-2  
 11:47  
 1910.  
 Dep't of State.

Telegram received from Manchester, Mass., June 25, 1910. Rec'd 11:01 A. M.

" His Excellency Mr. Knox, Secretary of State, Washington :

Thanking you for your telegram of yesterday, I have the honor to inform you that the document I requested by my telegram of 23rd instant was the preliminary warrant contemplated by Article two of Convention, April, 1884.

I am not able to answer second part of your telegram not having yet received instructions, but I have ground to believe that Italian Government would be willing to send all documents referring to the case should United States Government wish to have culprit judged by American courts for the crime he committed in Italy.

MONTAGLIARI."

(*Rec., p. 156.*)

[Telegram Sent.]

" DEPARTMENT OF STATE,  
 WASHINGTON, June 25, 1910.

MARCHESE PAOLO DI MONTAGLIARI, Italian Charge d'Affaires, Manchester, Mass :

In view of the fact that Charlton's arrest, to secure which the preliminary mandate described in Article two of the Convention of eighteen eighty-four is issued, has, it is reported, already been secured upon the complaint the Italian Consul ; and in view of your telegram of June twenty-fifth I assume that you are now awaiting instructions from your Government.

KNOX."

(*Rec., p. 156.*)

[Telegram Received.]

MANCHESTER, MASSACHUSETTS,

Dated June 27, 1910. Rec'd 9.30 P. M.

HONORABLE P. C. KNOX, Secretary of State, Washington :

Urgent. Judge Blair insists on having preliminary mandate prescribed in Article two of Convention of 1884, so as to maintain arrest of Porter Charlton. I beg you, Your Excellency, to urgently send me or directly to Italian Consul, New York, the said document so that arrest of murderer be maintained until a decision can be taken on the question."

(*Rec.*, p. 156.)

" JUNE 28, 1910.

SIR: I have the honor to acknowledge the receipt of your telegram of the 27th instant, concerning the case of Porter Charlton, and to enclose herewith the preliminary mandate requested.

In forwarding to you this preliminary mandate, which, as you know, has no other effect than merely to establish that extradition has been requested, without in any way involving a consideration of the legality or propriety of the extradition (which matters are determined when the extradition record is finally before the Department).

I desire to inform you that the certificate is sent with the distinct understanding that it is without prejudice to the right of this Government hereafter to determine the ultimate action to be taken by it in this case, in view of the answer already promised by the Italian Government to the question contained in the Department's telegram of the 24th instant.

Accept, Sir, the renewed assurance of my highest consideration.

P. C. KNOX."

(*Rec.*, p. 157.)

Enclosure: As above. 25010/24. 3 G. Y. (c) Marchese Paolo di Montagliari, Charge d'Affaires of Italy."

[Telegram Received.]

" MANCHESTER, MASSACHUSETTS,

Dated June 29, 1910.

Rec'd 10 P. M.

HONORABLE HUNTINGTON WILSON, Assistant Secretary of  
State, Washington :

Prevented to leave here. I have the honor to inform  
you that I will be unable to keep appointment made by  
telephone for to-morrow morning.

MONTAGLIARI."

[Translation.]

" ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., July 1, 1910.

MR. SECRETARY OF STATE : By telegram of June 24  
last Your Excellency inquired whether in instituting  
extradition proceedings in the case of Porter Charlton,  
who confessed having committed murder at Moltrasio,  
the King's Government intended to depart from the  
rule, heretofore observed, not to surrender its own sub-  
jects and whether it was to be inferred that Italians  
guilty of an offense committed on American territory,  
who should take refuge in Italy, should hereafter be de-  
livered without fail to the American Government."

I now have the honor to inform Your Excellency  
that the King's Government cannot depart from the  
principle established by our law that our nationals  
cannot be surrendered to foreign powers. Furthermore,  
this principle does not conflict with the provisions of  
the Extradition Convention. Indeed it seems logical  
that so far as parity in the matter of extraditing their  
respective citizens or subjects is concerned, each party  
should in the absence of specific provisions in the Con-  
vention itself, be guided by the spirit of its own legis-  
lation.

The Italian law does not consent to the extradition  
of nationals, but the Italian courts are competent to try  
on the request of a foreign Government, their nationals

who may have committed offenses on that Government's Territory.

Contrariwise, the laws of the United States by not permitting local tribunals to try American citizens for offenses committed abroad seem to admit of their being extradited. Otherwise an offender would, under the egis of the law itself, escape the punishment he deserves.

I have the honor to inform Your Excellency that the requisite extradition papers in the case of Porter Charlton will be forwarded to me without delay and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention.

Accept, Mr. Secretary of State, the assurances of my highest consideration.

MONTAGLIARI."

(*Rec.*, pp. 157, 158.)

[Translation.]

" ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., July 12, 1910.

No. 1131.

MR. SECRETARY OF STATE: In continuation of previous correspondence I have the honor to transmit herewith to Your Excellency a copy of the warrant of arrest issued June 13 last by the Examining Magistrate of the Civil and Criminal Court of Como against Mr. Porter Charlton.

Accept Mr. Secretary of State, the assurances of my highest consideration.

MONTAGLIARI."

" JULY 22, 1910.

SIR: The Department has received your note of the 12th instant, enclosing a copy of the warrant of arrest issued June 13th last by the Examining Magistrate of the Civil and Criminal Court of Como against Mr. Porter Charlton.

In reply I have the honor to inform you that the entire matter is now in the hands of the court, to whom all documents, papers, *et cetera*, which the Italian Government may have to offer in the case should now be presented.

The copy of the warrant is returned herewith.

Accept, sir, the renewed assurance of my high consideration.

HUNTINGTON WILSON,  
Acting Secretary of State."

Enclosure : Copy of warrant. Marchese Paolo di Montagliari, Charge d'Affaires of Italy. (c) 25010/36. 3 Pl. Y."

(*Rec.*, p. 159).

[Translation.]

No. 1229.

"ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., July 28, 1910.

MR. SECRETARY OF STATE : Referring to previous communication and in accordance with the provisions of Article V. of the Extradition Convention of March 23, 1868, I have the honor to lay before Your Excellency a formal request for the extradition of Porter Charlton who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II., Section I., of the said convention.

Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last the preliminary certificate of arrest provided by Article II. of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

In support of this request I have the honor to transmit herewith to Your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly visaed by the Embassy of the United States at Rome.

Awaiting the Federal "warrant" and the kind return

of the enclosed papers for submission to the competent court, I avail myself of this opportunity to renew to Your Excellency, together with my thanks in advance, the assurance of my highest consideration.

MONTAGLIARI."

(*Rec.*, p. 150.)

Then succeeds further correspondence as follows :

[Telegram Received.]

" MANCHESTER, MASS., August 5, 1910.

Rec'd 12:45 p. m.

SECRETARY OF STATE, Washington, D. C.

I beg Your Excellency to kindly give an answer to my note number 1229 of July 28, and to return to me documents therein enclosed in time for presentation to competent authorities.

MONTAGLIARI."

(*Record*, p. 159).

[Telegram Received.]

" MANCHESTER, MASS., Dated Aug. 5, 1910.

Rec'd Aug. 6, 8:23 a. m.

HON. HUNTINGTON WILSON, Washington.

Department's note and documents just received. Please except my best thanks.

MONTAGLIARI."

(*Record*, p. 159).

[Telegram Sent.]

" DEPARTMENT OF STATE,

WASHINGTON, August 5, 1910.

25010/46.

MARCHESE PAOLO DI MONTAGLIARI,  
Italian Charge d'Affaires,  
Manchester, Mass.:

Papers returned to you yesterday with note informing you that Department will in accordance with the



principles of law governing its action in such matters determine the question of the issuance of a Federal warrant when the judicial proceedings in the case have been completed and the courts have held the accused for surrender.

WILSON."

(*Record*, p. 159).

" DEPARTMENT OF STATE,  
WASHINGTON, August 5, 1910.

No.-----

SIR :

I have the honor to acknowledge the receipt of your note of the 28th ultimo in which you transmit to this Department certain papers in the matter of the extradition of Porter Charlton, who you state has confessed to the crime of murder committed on the person of his wife at Moltrasio, Como, which crime is specified in Article II., Section 1 of the Extradition Convention of March 23, 1868, between the United States and Italy " (*Record*, p. 159).

The letter goes on to state that he returns the papers forwarded, pointing out that the case is now in the hands of the court and is not before the Department, and not properly before the Department until the extradition magistrate shall have committed the accused for surrender, and that all documents should be presented directly to the court now having the case in charge.

Concerning the request for the issue of the Federal Warrant, calls attention to the Department's telegram of June 24th to the effect that no Federal Warrant issues until the fugitive is surrendered, and this takes place only after the matter has been fully considered by the courts. Nothing in the present case to change this procedure ;  
and concludes :

" In view of your remark that the Department has already issued a ' preliminary certificate of arrest ' in this case, I am constrained again to direct your attention to the actual situation set forth in the Department's letter to you of

June 28th (which enclosed the preliminary mandate requested), in which you were advised that such mandate had no other effect than to indicate that extradition would be requested and that its issuance did not in any way involve a consideration of the legality of the propriety of the extradition—matters to be determined when the extradition record was finally before the Department. The Department at that time also informed you that the certificate was sent with the distinct understanding that it should be without prejudice to the right of this Government hereafter to determine the ultimate action to be taken in this case. The question of the issuance of the Federal warrant of surrender will be considered when the case is formally and properly before the Department for final determination.

Accept, sir, the renewed assurances of my high consideration.

HUNTINGTON WILSON,  
Acting Secretary of State.

Enclosures : Papers as above.

Marchese Paolo di Montagliari, Charge d'Affaires of Italy."

(*Record*, p. 160).

On December 9, 1910, Knox writes to Montagliari that he has the honor to inform him that "I have this day decided to surrender Porter Charlton to your Government in furtherance with its request." (*Record*, p. 161.)

On December 10, 1910, Knox writes Cusani :

"In compliance with the request made by your Embassy in its note of July 28th last, and in pursuance of existing treaty stipulations between the United States and Italy, I have the honor to enclose a warrant of surrender in the case of Porter Charlton, charged " etc. (*Record*, p. 161.)

On December 10, 1910, Cusani writes Knox thanking him for so promptly advising him of his decision (*Record*, p. 161).

On December 13, 1910, The Italian Ambassador writes Knox as follows :

" As the attorneys for Porter Charlton are going to fight his extradition, the Italian Embassy would like to be informed if the Department of Justice will take charge of sustaining the decision already rendered by the Hon. Knox in the matter, and consequently will fight, with the assistance of the United States Attorneys, the arguments of the appealing party before the Federal Courts " (*Record*, p. 164).

On December 14, 1910, Knox writes Montagliari that the presentation of the case of Italy before the Federal Courts in the proceedings upon *habeas corpus* which have been instituted by the fugitive will, like the proceedings before the committing magistrate, rest upon such persons as may be designated by the Italian Government, and that the Department of Justice of the United States has no power or authority (*Record*, p. 162).

On December 23, 1910, Cusani writes to Knox stating that Mr. Pierre P. Garven, representing the Italian Government, desires a certified copy of the warrant of surrender in the Charlton case (*Record*, p. 162).

On December 26, 1910, Cusani writes to Knox stating that, according to verbal request, he has asked attorney why he wants a copy instead of using the original, and the answer is that Mr. Garven wishes to serve the sheriff Kelly with a duplicate and does not deem it proper to do away with the original (*Record*, p. 163).

On December 29, 1910, Knox writes Cusani that he would be glad to meet the wishes of the attorney for the Italian Government, but " it is the opinion of the Department that the original warrant of surrender now in your hands will serve all the purposes desired " (*Record*, p. 163).

THE SUBSTANCE OF THE CORRESPONDENCE BETWEEN THE HONORABLE SECRETARY OF STATE AND PETITIONER'S COUNSEL IN RELATION TO THE ALLEGED FORMAL DEMAND IS AS FOLLOWS :

On July 25, 1910, petitioner's counsel wrote to the Secretary of State requesting certified copies of certain diplo-

matic correspondence in 1894 in relation to the DiBlasi case. (*Record*, p. 164.)

On August 1, 1910, the State Department answered this referring to their former letter of July 6 "in which you were informed that the Department could furnish copies of its records for use as evidence in the courts in those cases only in which such action would not be prejudicial to the public interests and in which it could be affirmatively made to appear that the paper requested was relevant to some point under judicial consideration and that substantial justice required that it should be furnished; and further that before such records could be so furnished, it would be necessary for the court, before which the case was pending, to indicate its desire that it be furnished, for its information, copies of the correspondence designated in the request.

This letter set forth the general rule of the Department in such cases, and the Department has, therefore, again to suggest that it would not consider it proper to furnish the correspondence desired by you upon your request, but that it will be pleased carefully to consider any request which a competent court may see fit to make.

I am, Sir,

Your obedient servant,

ALVEY A. ADEE,  
Acting Secretary of State."  
(*Record*, p. 165.)

On July 28, 1910, a few days before the forty days after the preliminary request would expire the counsel for the prisoner wrote to the Hon. Secretary of State as follows :

JULY 28, 1910.

"THE HONORABLE SECRETARY OF STATE, Washington,  
D. C.:

SIR: Referring to the case of Porter Charlton and the provision in the Treaty between the United States and Italy, being the Convention of 1884, amending the treaty of 1868, under which the requisition is to be accompanied by the documents mentioned in Article 5 of the Treaty, I would respectfully request that if and whenever the Italian Government shall make requisi-

tion upon your office for the extraditions of the said Porter Charlton, accompanied by the documents mentioned, you will inform me of such fact.

The arrest was made on June 23, 1910, and under the provisions of the Treaty if this formal demand, supported by the evidence as therein provided, is not made within forty days from the date of the arrest, the prisoner is entitled to his liberty, and it is important that, as attorney for the prisoner, I should be advised when any such demand, accompanied by the documents mentioned in the Treaty, has been properly made on your Department.

Thanking you for your courtesy in the premises, I am, Sir,

Your obedient servant,

R. FLOYD CLARKE."

(*Rec.*, pp. 154, 155).

On August 2, 1910, the day before the 40 days from the arrest issued expired the Hon. Secretary of State answered the above letter of petitioner's counsel dated July 28, 1910, as follows :

DEPARTMENT OF STATE,  
WASHINGTON, August 2, 1910.

MR. R. FLOYD CLARKE, 37 Wall Street, New York City.

SIR: I acknowledge the receipt of your letter of July 28th, in further reference to the case of your client, Porter Charlton.

Your request that you be informed if and whenever the Italian Government shall make request upon this Department for the extradition of Porter Charlton will be complied with.

I am, Sir,

Your obedient servant,

ALVEY A. ADEE,

Acting Secretary of State."

(*Rec.*, pp. 165 to 166).

On August 5, 1910, petitioner's counsel wrote to the Secretary requesting leave to use on an application before Judge

BLAIR his letters to the Secretary of July 1st and 25th, and answer of Secretary of August 1.

(*Rec.*, p. 166).

On August 9, 1910, Secretary of State wrote to petitioner's counsel granting this request.

On August 10, 1910, counsel again wrote to the Hon. Secretary as follows :

" NEW YORK, Aug. 10, 1910.

THE HONORABLE SECRETARY OF STATE, WASHINGTON.

SIR : Referring to my letter to you of July 28th, 1910, in which I requested you to kindly inform me when, under the provisions of the Treaty between the United States and Italy, there should be presented to your Department the formal demand for the extradition of Porter Charlton accompanied by the documents mentioned in Article V of the Treaty, and your reply of August 2, 1910, in which, after acknowledging receipt of the letter, you state that you will inform me whenever such request is made by the Italian Government, I would call your attention to the fact that there have appeared in the public press various news items to the effect that some document of the kind in question was presented to your Department.

Under the circumstances I respectfully beg to be informed whether up to date there has been presented to your Department any formal demand for the extradition of Porter Charlton accompanied by the documents mentioned in Art. V of the Treaty of 1868 as amended by the Convention of 1884.

Thanking you for your courtesy in the premises, I am, Sir,

Your obedient servant,

R. FLOYD CLARKE."

(*Rec.*, pp. 166, 167.)

On August 15, 1910, the Secretary's office answered as follows :

" DEPARTMENT OF STATE,  
WASHINGTON, August 15, 1910.

MR. R. FLOYD CLARKE,  
37 Wall Street, New York.

SIR : I acknowledge the receipt of your letter of the 10th instant in further reference to the case of Porter Charlton.

The Department recently received from the Italian Government documents said to contain evidence of the guilt of Charlton of the crime with which he is charged, and the documents were accompanied with a request for a Federal warrant. The documents were, however, returned to the Embassy with the statement that they were not now properly presentable to the Department, which had nothing to do with the case (which was now before the courts) until the judicial proceedings should be finished and the accused finally committed for surrender, and that the question of issuing the warrant of surrender would be considered when the case was properly submitted to the Department for determination.

I am, Sir,

Your obedient servant,

HUNTINGTON WILSON,  
Acting Secretary of State."

(*Rec.*, p. 167).

On Sept. 1, 1910, counsel wrote to the Hon. Secretary as follows :

" NEW YORK, Sept. 1, 1910.

THE HONORABLE THE SECRETARY OF STATE, Washington, D. C.

SIR : Thanking you for your communication in the case of Porter Charlton of August 15th, in which you state that " the Department recently received from the Italian Government documents said to contain evidence of the guilt of Charlton of the crime with which he is



charged and the documents were accompanied with a request for a federal warrant. The documents were, however, returned to the embassy with the statement," etc., and referring to the statement in the public press to the effect that the documents in question were returned unopened by the Department to the Italian Embassy, I would respectfully inquire whether, upon presentation to the Department, the documents in question were marked as received, or were merely returned without opening and without endorsement for the reasons set forth in your letter above referred to?

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,

Attorney for Porter Charlton."

(*Rec.*, pp. 167 to 168).

No answer was ever received to this inquiry. Receiving no answer, on September 12, 1910, counsel for the prisoner again wrote to the Hon. Secretary as follows:

"NEW YORK, Sept. 12, 1910.

THE HONORABLE SECRETARY OF STATE, Washington,  
D. C.

SIR: Referring to my favor to you of August 10th, and your answer of the 15th, in which you state that the Department recently received from the Italian Government documents said to contain evidence of the guilt of Charlton of the crime of which he is charged and the documents were accompanied with a request for federal warrant; will you kindly inform me of the exact day and hour when said documents and request were received by the Department?

The case is set for trial for September 21, 1910, the provisions of the treaty require that these documents shall be forwarded to the State Department within forty days from the arrest, and this date is of importance to my client for the reasons stated.

Under the circumstances, I request your prompt answer, and your permission to use the answer as evi-

dence of the date of the receipt of the documents if the facts as so developed may be of advantage to my client.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,

Att'y for Porter Charlton.

(*Rec., p. 168.*)

Counsel again wrote to the Hon. Secretary of State on Sept. 16, 1910, as follows :

" NEW YORK, Sept. 16, 1910.

" THE HONORABLE SECRETARY OF STATE, Washington,  
D. C.

SIR : Referring to my letter to you of August 10th, which you answered on the 15th, and my letters of September 1st and 12th, which up to date remain unanswered, I would respectfully advise you that I have recently obtained a translated copy of the documents which the Italian Government has presented to the Court of Oyer and Terminer, Judge BLAIR presiding.

These papers contain the evidence of the Italian Government on the question of the perpetration of the crime and the surrounding circumstances and the probably identity of the criminal.

They do not contain, however, any formal demand on the part of the Italian Government to the United States Government or to the Court of Oyer and Terminer for the extradition of Charlton.

As such formal demand in addition to the original requisition mentioned in the Treaty of 1868 is absolutely required by the amendment of Article V under the Convention of June 11, 1884, the fact of whether such a formal demand in connection with the papers supporting by the evidence the commission of the crime, etc., as in the treaty provided has been made, is essential to be presented to the Court on the question as to whether the Italian Government has complied with the Treaty in formally demanding extradition.

As indicating to your good judgment the fact that our insistence upon this pre-requisite that a formal

demand shall be made by the Italian Government before further proceedings shall be had herein is warranted, I would call your attention to the fact that the treaty calls for two pre-requisites to its operation :

1st. The original requisition of the Italian Government or of the Secretary of State.

On this the mandate issues for a preliminary arrest, and I understand that these pre-requisites have been performed in this case.

In addition, the treaty expressly provides as follows :

' And the person thus accused and imprisoned shall, from time to time, be remanded to prison until a formal demand for his or her imprisonment shall be made and supported by evidence as above provided,' etc.

We have inspected a copy and translation of the supporting evidence.

I have been informed by the Prosecutor's office in Hudson County that no formal demand has been filed there, and I am therefore anxious to know if it has been filed in your Department, and, if so, when.

It is important that I should know this, as the hearing before Judge BLAIR has been fixed for Wednesday, September 21st, at 10 A. M.

Under the circumstances I trust you will extend to me the courtesy of an early reply to the following questions :

1st. Has a formal demand for the extradition of Porter Charlton, independent of the original request for a warrant, been filed in your office ;

2d. At what date, if any, the same was filed ; and

3d. Certified copy of the same with memorandum of its filing for use before the Judge at the trial ;

4th. Certificate that no such formal demand has been filed in your office, for like use.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,  
Attorney for Porter Charlton.

(*Rec.*, 168-170).

Receiving no answer Counsel telegraphed the Hon. Secretary of State on September 20, 1910, the day before the day set for the hearing which was to be September 21, 1901, as follows :

" FROM NEW YORK, Dated September 20, 1910.

THE HONORABLE THE SECRETARY OF STATE, Washington :

Referring to the Charlton case and my letter to you of eighteenth instant I respectfully request that you forward to me for use in court to-morrow, Wednesday morning, certified copies of original requisition for a warrant and the formal demand for his extradition independent of the request for a warrant or a certificate that no such demand has been made with dates, etc.

R. FLOYD CLARKE,  
Attorney for Porter Charlton."

(*Record*, p. 170.)

(Note the preceding telegram p. 170 was in error in mentioning a letter of twenty-first which should have been of eighteenth, hence telegram repeated to correct error).

(*Record*, p. 170.)

On September 20, 1910, the Department wrote to counsel as follows :

" DEPARTMENT OF STATE,  
WASHINGTON, September 20, 1910.

MR. R. FLOYD CLARKE, 37 Wall Street, New York City.

SIR:—The Department has received your letter of the 12th instant, inquiring the exact time of receipt at this Department of certain documents from the Italian Government said to contain evidence of the guilt of Porter Charlton, your client.

In reply you are informed that the communication in question from the Italian Government was received at the State Department on July 30, 1910.

I am, Sir,

Your obedient servant,

HUNTINGTON WILSON,

Acting Secretary of State."

(*Rec.*, p. 170.)

Note the apparent contradiction between the letter from the Secretary of State's office of August 2, 1910, and this letter of September 20, 1910, and the strange neglect through all those months to answer a simple question asked as to this important date.

And now note a curious refusal to furnish copies of these documents a necessary part of the record in this case and on which a citizen's liberty, perhaps his life, depends.

On September 21, 1910, the parties wrote letters which crossed in the mail as follows :

" DEPARTMENT OF STATE,  
WASHINGTON, September 21, 1910.

MR. R. FLOYD CLARKE, 37 Wall Street, New York City.

SIR: The Department has received your letter of the 16th instant, making certain inquiries regarding the Charlton matter.

It would seem that, should you feel that the treaty requirements have not been complied with in this case, you should present the matter in a proper form and at the appropriate stage of the proceedings to the court having the matter in charge.

I am, sir,

Your obedient servant,

HUNTINGTON WILSON,  
Acting Secretary of State."

(*Rec., p. 171.*)

" R. FLOYD CLARKE,

Attorney and Counselor at Law,

37 William Street.

*In Re Porter Charlton Case.*

NEW YORK, Sept. 21, 1910.

THE HONORABLE SECRETARY OF STATE, Washington, D. C.

SIR: Referring to my letter to you of September 16th and my telegram to you of September 20th, 1910, I

again respectfully request that you forward to me, as quickly as possible, the following documents :

1st. A certified copy of the original requisition of the Italian Government upon the Secretary of State for the preliminary arrest of Porter Charlton, which was the basis of your mandate in the case issued on June 28th, 1910.

2nd. A certified copy of the warrant for his arrest in the country where the crime may have been committed, if any such did accompany said request for surrender.

3rd. A certified copy of the depositions upon which such a warrant may have been issued, if any such did accompany the requisition as aforesaid.

4th. A certified copy of the formal demand, if any, made by the Italian Government for the extradition of Porter Charlton, succeeding the original requisition as aforesaid, as required by the amendment to Article 5 under the convention of 1884 additional to the Extradition Convention of 1868, and, in addition thereto, the dates and times when the said various documents, and each of them, were presented and filed in your office if any.

In case any of these documents have not been presented or filed in your office in connection with the original requisition, please so certify.

I am, sir,

Your obedient servant,

R. FLOYD CLARKE,

Attorney for Porter Charlton."

(*Rec., p. 171.*)

And thereafter the following correspondence occurred.

" DEPARTMENT OF STATE,  
WASHINGTON, September 22, 1910.

MR. R. FLOYD CLARKE, 37 Wall Street, New York City.

SIR: The Department acknowledges the receipt of your two telegrams of the 20th instant, in regard to

certain documents concerning the case of Porter Charlton, your client, and refers you in reply to its letter of the 21st instant.

I am, sir,

Your obedient servant,

HUNTINGTON WILSON,  
Acting Secretary of State."

(*Rec.*, p. 172).

" R. FLOYD CLARKE,  
Attorney and Counsellor at Law,  
37 Wall Street.

*In re Porter Charlton.*

NEW YORK, Sept. 22, 1910.

THE HONORABLE THE SECRETARY OF STATE, Washing-  
ton, D. C.

SIR : I am just in receipt of your communication of the 21st instant in answer to my letter of the 16th instant.

In this connection I would call your attention to the fact that my letter of the 16th instant, besides making certain inquiries as to the state of record in your Department on the extradition proceedings in the Charlton case, also requested you specifically to furnish me :

1st. A certified copy of the formal demand, if any, for the extradition of Porter Charlton, independent of the original request for a warrant ; or

2nd. A certificate that no such formal demand had been filed in your Department if such were the case, for like use.

In this connection I afterwards supplemented this request for certified copies by my telegram of the 20th inst., in which I requested :

1st. Certified copies of the original requisition for a warrant ; and

2nd. Certified copies of the formal demand for the extradition, independent of the request for a warrant ;



3rd. Certificate that no such demand had been made, with dates, etc.

And on the 21st instant I supplemented said requests by the further request for certified copies as follows :

1st. A certified copy of the original requisition of the Italian Government upon the Secretary of State for the Preliminary Arrest of Porter Charlton, which was the basis of your mandate in the case issued on June 28th, 1910.

2nd. A certified copy of the warrant for his arrest in the country where the crime may have been committed, if any such did accompany said request for surrender.

3rd. A certified copy of the depositions upon which such warrant may have been issued, if any such did accompany the requisition as aforesaid.

4th. A certified copy of the formal demand, if any, made by the Italian Government for the extradition of Porter Charlton, succeeding the original requisition as aforesaid, as required by the amendment to Article 5 under the Convention of 1884 additional to the extradition convention of 1868, and, in addition thereto, the dates and times when the said various documents, and each of them were presented and filed in your Department, if any.

In case any of these documents have not been presented or filed in your Department in connection with the original requisition, please so certify.

In your letter of the 21st instant, above referred to, you state :

“ It would seem that should you feel that the treaty requirements have not been complied with in this case, you should present the matter in a proper form and at the appropriate stage of the proceedings to the court having the matter in charge.”

As to this, I would respectfully call your attention to the fact that as I have heretofore advised you, my repeated requests for certified copies of what record there may be of this case in your Department has been for the purpose of presenting the matter in a proper

form and at the appropriate stage of the proceedings, to the Court having the matter in charge, for, without the record in your Department as to the proceedings taken by the Italian Government for the extradition of the prisoner, or certified copies of that record, it is impossible to determine whether the Italian Government has taken the necessary steps which are required by the treaty for the purposes of his extradition so as to give the court any jurisdiction in the premises.

Of course the burden of proof is on the prosecution to establish a compliance with the strict requirements of the treaty, but, as a matter of precaution, and for the purpose of establishing the facts as they are, even though they constitute a negative, my requests for certified copies or a certificate that no such documents were in your Department, were for the purpose of presenting to the court the record of the transactions between the governments in regard to this matter—a record without which it is impossible to determine, except on the basis of the burden of proof, the compliance or non-compliance of the Italian Government with the pre-requisites of the extradition of the prisoner in this case.

The treaty clearly provides, after the insertion of the amendment to Article V by the additional convention of 1884—

1st, For a requisition, whether accompanied by a copy of the warrant or of the deposition, or merely a preliminary requisition ; and

2nd. A formal demand for his or her extradition, in addition to the original requisition ; and further provides " that if the requisition, together with the documents above referred to (which include the warrant or the depositions and the formal demand) shall not be made \* \* \* within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

The state of the records of your Department, therefore, as to what action has been taken by the Italian Government to comply with these requirements, is the basis of one of the legal questions involved in this case

as to whether the man is extraditable under the forty-day clause in this proceeding.

In view of the diplomatic dispute which has existed between the governments, which began about twenty years ago, as to whether the word 'persons' in the treaty includes citizens of the asylum country, and the fact that the Italian Penal Code of 1890, by its Article 9, has enacted that no Italian citizen shall be extradited, thereby abrogating and repealing any covenant to this effect that might have been contained, expressly or by implication, in the treaties of 1868 and 1884 the insistence in this case upon proof of the formal demand required under the treaty within the forty days is not an insistence upon merely a question of time but an insistence upon a question of substance.

For while the original requisition of the Italian Government in this case might have been made in ignorance of the citizenship of Charlton, and Italy not thereby been bound to our construction of the treaty by her making such original requisition, Italy has since received full notice of his citizenship, and any formal demand made by that government after such notice would be in the nature of a waiver of her former construction of the treaty—a waiver which is scarcely permissible to be made by her foreign department in view of her Penal Code, but which, if made, would be of great importance to this government.

For this reason the insistence upon this formal demand as part of the extradition papers is one of as much importance to the public policy in the matter hitherto advocated by your Department as it is to the prisoner.

Accordingly, as Section 882 of the U. S. Revised Statutes provides that "copies of any books, records, papers or documents, in any of the executive departments, authenticated under the seal of such departments respectively, shall be admitted in evidence equally with the originals thereof," I have, pursuant to the authority granted by that section duly requested your Department to furnish me with certified copies of their record in this case for use in this hearing.

I know of no other way to present the matter to

the court, in a proper form and at the appropriate state of the proceedings, than to prepare beforehand, either by taking the depositions of the officers of your Department, or by obtaining certified copies of your records, so as to be able to present to the court the facts which are germane to the issue.

As I did not desire to take up your time or mine unnecessarily in issuing commissions to take depositions, and as the statute gave full authority to use certified copies in the premises, and as the same were documents in your Department, which is one of the Executive Departments of the Government of the United States, the production of which, under the circumstances of this case, was not inimical to the public interests, for the purposes of this hearing, as being the actual record in the case necessary for its proper presentation to the court, in that they constituted the very record on which the extradition may or must not be granted, I requested your Department to furnish certified copies as being the method whereby with the least inconvenience to your Department and the least expense to the prisoner, the matter could be presented in a proper form and at the proper stage of the proceedings to the court having the matter in charge.

Trusting that, after this full explanation of the materiality and legality and necessity of my request for these certified copies made as above, you will see your way clear to furnish them to me as requested, in time to be presented and made a part of the record in this matter the prosecution having failed to present them, and the objection having been taken on that ground, while I wish to present before the court and before you every item of fact as they existed and not under mere presumptions, I respectfully request that the documents in question be furnished as heretofore requested as soon as conveniently may be.

I am, Sir,

Your obedient servant,

R. FLOYD CLARKE,

Attorney for Porter Charlton."

(*Rec.*, pp. 172-175).

" DEPARTMENT OF STATE,  
WASHINGTON, October 1, 1910.

MR. R. FLOYD CLARKE, 37 Wall Street, New York City.

SIR: In reply to your letters of the 21st and 22nd ultimo, in further reference to the case of Porter Charlton, you are referred to the Department's letter of the 21st ultimo wherein you are informed that, should you feel that the Treaty requirements have not been complied with in this case, it would seem that you should present the matter in a proper form and at the appropriate stage of the proceedings to the Court having the matter in charge.

It may be added that this sets forth the uniform attitude and practice of the Department on these matters, and no sufficient reason is perceived that would call for or justify a different course in this case.

I am, Sir,

Your obedient servant,

ALVEY A. ADEE,  
Acting Secretary of State."

(*Rec.*, p. 175).

And so the matter ended and from the time of this last insistence by the Hon. Secretary of State upon this Star Chamber attitude with reference to Records in his Department, part of the Record in these extradition proceedings possibly of vital importance to the prisoner, until the *habeas corpus* proceedings were brought before the U. S. District District Court and three writs of *certiorari* issued to bring up these and other records—those records remained concealed and unknown to the prisoner and his counsel—as completely hidden as were the lettres de cachet of the time of the Grand Monarque.

This record is set out here in the hope that this Court, whichever way its decision may be herein on the merits, may in no weak manner set the seal of its disapproval on such Star Chamber methods in matters affecting the liberty and lives of our citizens. This boy's fate—he is scarcely a man—having been 21 the day of the hearing before Judge BLAIR—is of little importance beside the principles of Constitutional liberty involved in this correspondence.

### PART III.

## BRIEF OF THE ARGUMENT.

### A.

#### Facts.

#### Summarized Statement.

Upon March 23, 1868, there was concluded between the Government of the United States and the Kingdom of Italy a convention of extradition, ratifications of which were exchanged September 17, 1868, and which was proclaimed September 30, 1868.

The following are the extracts verbatim from said treaty covering all matters in the treaty germane to the case under consideration :

#### TEXT OF THE EXTRADITION TREATY OF 1868.

“ The United States of America and His Majesty the King of Italy, having judged it expedient, with a view to the better administration of justice and to the prevention of crimes within their respective territories and jurisdiction, that *persons* convicted of or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose, and have appointed as their plenipotentiaries :

\* \* \* \* \*

#### \* ARTICLE I.

The Government of the United States and the Government of Italy mutually agree to deliver up *persons* who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories

of the other ; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

\* \* \* \* \*

## ARTICLE II.

Persons shall be delivered up who shall have been convicted of or be charged, according to the provisions of this convention, with any of the following crimes<sup>1</sup> :

1. Murder, comprehending the crimes designated in the Italian Penal Code by the terms of parricide, assassination, poisoning and infanticide," etc.

\* \* \* \* \*

## ARTICLE V. (a)

"Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the contracting parties, or in the event of the absence of these from the country or its seat of government, they may be made by superior consular officers. If the person whose extradition may be asked for shall have been convicted of a crime, a copy of the sentence of the court in which he may have been convicted, authenticated under its seal, and an attestation of the official character of the judge by the proper executive authority, and of the latter by the Minister or Consul of the United States or of Italy, respectively, shall accompany the requisition. When, however, the fugitive shall have been merely charged with a crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such warrant may have been issued, must accompany the requisition as

<sup>1</sup> Kidnapping added to the list of crimes by Art. 1 of the Convention of June 11, 1884.

(a) Amended by Art. II. of the Convention of June 11, 1884.



aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence the extradition is due, pursuant to the treaty, the fugitive may be given up, according to the forms prescribed in such cases.

\* \* \* \* \*

#### ARTICLE VII.

This convention shall continue in force during five (5) years from the day of exchange of ratifications ; but if neither party shall have given to the other six (6) months previous notice of its intention to terminate the same, the convention shall remain in force five years longer, and so on.

1. Treaties, Conventions, etc., between United States of America and other Powers, 1776-1909, published by the Government under authority of Congress in 1910, pp. 966-968.

An additional convention of extradition was concluded between the same governments on January 21, 1869, ratifications exchanged May 7, 1869, and the same was proclaimed May 11, 1869. This referred solely to the offense of embezzlement and is not germane to the inquiry here. *Id.*, 969.

A convention additional to the extradition convention between the same governments of 1868 was concluded between them June 11, 1884 ; ratifications were exchanged April 24, 1885, and the same was proclaimed April 24, 1885.

The following portions of said additional convention are germane to this case :

#### TEXT OF THE ADDITIONAL CONVENTION OF 1885.

“ The President of the United States of America and His Majesty the King of Italy, being convinced of the necessity of adding some stipulations to the extradition convention concluded between the United States

and Italy on the 23rd of March, 1868, with a view to the better administration of justice and the prevention of crime in their respective territories and jurisdictions, have resolved to conclude a supplementary convention for this purpose and have appointed as their plenipotentiaries—to wit : the President of the United States, Frederick T. Frelinghuysen, Secretary of State of the United States.

\* \* \* \* \*

## ARTICLE II.

The following clause shall be inserted after Article V. of the aforesaid convention of March 23, 1868 :

Any competent judicial magistrate of either of the two countries shall be authorized after the exhibition of a certificate signed by the Minister of Foreign Affairs (of Italy) or the Secretary of State (of the United States) attesting that a requisition has been made by the government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime, for which, pursuant to this convention, extradition may be granted ; and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered ; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided ; if, however, the requisition, together with the documents above provided for, shall not be made, as required, by the diplomatic representative of the demanding government, or in his absence by a consular officer thereof, within forty days from the

date of the arrest of the accused, the prisoner shall be set at liberty.

### ARTICLE III.

These supplementary articles shall be considered as an integral part of the aforesaid original extradition treaty convention of March 23, 1868, and together with the additional article of January 21, 1869, as having the same value and force as the convention itself, and as destined to continue and terminate in the same manner.

The present convention shall be ratified and the ratifications exchanged at Washington as speedily as possible, and it shall take effect immediately after the said exchange of ratifications."

1 Treaties, Conventions, etc., between United States of America and other Powers, 1776-1909, published by the government, under authority of Congress in 1910, pp. 985, 986.

### Cases Under the Treaty.

Under the treaty the following cases have occurred :

#### 1. The Paladini Case—May, 1888.

On May 17, 1888, Mr. Stallo, American Minister, demanded of the Italian Government the extradition of Salvatore Paladini, an Italian citizen, on a charge of passing counterfeit money.

Extradition was refused (*Rec.*, p. 124).

The refusal to do so was based on "the ground that the treaty did not require the surrender of citizens" (*Rec.*, p. 123), and the Italian "interpretation of the treaty of 1868 had been based upon the circumstances that the law of Italy prevented the extradition of Italian subjects for crimes perpetrated in foreign jurisdictions, the crimes committed by them being justiciable by the Italian Courts."

On October 25, 1888, Italy announced in answer to the demand of the United States in this case that the demand had been submitted to the successive examination of the criminal section of the Court of Appeals of Messina, of the council of State, and of the council of ministers, and that they were

unanimously of opinion that Paladini should not be extradited for the reason that he was an Italian subject. This opinion, he said, was based upon certain principles, which he stated. It is unnecessary to recount them, since they are the same, in almost the same language, as those set forth in your note.

(*Rec.*, p. 124.)

In connection with this case an extended controversy occurred between the State Department of the United States and the Italian Foreign Office.

See

A. Defendant's Exhibit A—Letter of Baron Fava to Mr. Blaine, April 20, 1890 (*Rec.*, pp. 118-120).

B. Defendant's Exhibit B—letter of Mr. Blaine to Baron Fava, June 23, 1890 (*Rec.*, pp. 121-130).

In this controversy the U. S. State Department claimed that the treaty under its true construction required the surrender to the demanding Government of citizens of the country on which demand was made—who committing crimes in the former country had fled to the latter for asylum. On this ground the U. S. Government demanded the extradition of Paladini.

The Italian Government took the ground that the treaty did not apply to citizens of the country upon whom demand for extradition was made, and refused to comply with the demand (*Rec.*, p. 124).

## **2. The Bevivino and Villella Cases.**

On January 30, 1889 Governor Beaver of Pennsylvania made a formal request on the U. S. State Department for the extradition of these two men who were Italian citizens and who were wanted for atrocious murder in Lucerne Co., Pa. (*Rec.*, p. 125).

The warrant was issued and agents sent to arrest the fugitives (*Rec.*, p. 125).

Demand was made on Italy for their extradition and the demand was refused.

The reasons given were the same as those stated in the case of Paladini (*Rec.*, p. 125).

Later the Italian Government sent over to the U. S. State Department Letters Rogatory for the examination in Pennsyl-

vania of witnesses whose depositions were intended to be used in the trial of Bevivino and Villella in Italy (*Rec.*, p. 118).

The U. S. State Department in answering this note stated they would forward the Letters Rogatory to Governor Beaver but called the attention of the Italian Government to the fact that the United States had

“applied more than a year ago for the extradition of Bevivino and Villella and that the Royal Government refused to surrender these two persons on account of their Italian nationality,”

and that while transmitting the Letters Rogatory the U. S. Government

“must reserve the right to which the United States Government is entitled to secure the extradition of Bevivino and Villella in order that they may be tried in the country in which they committed the crime” (*Rec.*, p. 119).

Thereupon ensued the diplomatic dispute above mentioned.

See Defendant's Ex. A to C inc. (*Rec.*, pp. 118-131).  
See *infra* in this Brief, Part III., Point I. (p.     ).

In the dispute over the Bevivino and Villella cases in 1890, Mr. Blaine, then Secretary of State, wrote to Baron Fava, Italian Minister in the United States, a letter dated June 23, 1890 (*U. S. For. Rel. 1890*, p. 559), in which he made the following observation :

“In view of what has been shown, I am unable to discover any ground of reconciliation of the totally opposite views entertained by the United States and Italy in regard to the force and effect of the treaty of 1868, unless the Government of Italy will reconsider its position. The present situation, therefore, seems to me to require either the denunciation of that treaty or the conclusion of new stipulations upon which the contracting parties will find themselves in agreement. If, as a part of those stipulations, citizens should be excepted, it will be essential to reach an understanding as to the

effect of naturalization. These matters it is not my purpose to discuss on the present occasion, but I deem it my duty to suggest them for consideration."

(*Record*, p. 129).

This note of Mr. Blaine was in answer to one of Baron Fava in which the Italian construction of the treaty was fully set forth.

### **3. The Delzoppo and Rinaldi cases.**

In January, 1894, on requisition from the Governor of the State of New York, the U. S. State Department requested the extradition of Delzoppo and Rinaldi, two Italian citizens who were wanted in the State of New York to answer indictments for the crime of murder there committed.

The warrant was issued, agents forwarded to Italy to arrest, and the American Ambassador in Italy instructed to request extradition.

(*Rec.*, p. 131).

On the American Minister making the demand the answer was—

"that the Government of the King could never consent to the delivery in extradition of two of its subjects."

(*Letter Baron Blanc to Mr. Mac Veagh*, *Rec.*, p. 132).

Thereupon the U. S. State Department wrote to the Italian Minister as follows:

"It is deemed proper, however, that you should state to the Italian Minister for foreign affairs that while this Government will not at this time insist upon its rights under the treaty between the two Governments, it, nevertheless, does not waive such rights nor acquiesce in the view taken by the Government of Italy.

I am, etc.,

EDWIN F. UHL,

Acting Secretary."

(*Letter April 24, 1894, Mr. Uhl to Mr. Mac Veagh*, *Rec.*, p. 133).

In this connection the U. S. State Department wrote to the Governor of New York as follows :

DEFENDANT'S EXHIBIT E.

" DEPARTMENT OF STATE  
WASHINGTON, February 13, 1894.

HIS EXCELLENCY THE GOVERNOR OF THE STATE OF NEW  
YORK,

Albany, New York.

SIR :

Referring to the Department's telegram of the 27th ultimo, I have the honor to enclose herewith for your fuller information, a copy of the reply of the Italian Minister of Foreign Affairs to the request of this government for the provisional arrest of the fugitives Delzoppo and Rinaldi.

The concluding paragraph of the minister's note indicates that the Italian Government will not surrender the fugitives but will try them in Italy. This is in accordance with their action heretofore when the extradition of Italian subjects has been requested.

I have the honor to be, Sir,

Your obedient servant,

(Signed)

EDWIN F. UHL,

Acting Secretary."

(*Rec., p. 108*).

**4. The Di Blasi Case.**

In 1899 the Governor of Massachusetts requested the U. S. State Department to demand of Italy the extradition of an alleged murderer and Italian citizen named Di Blasi.

Thereupon the U. S. State Department answered as follows :

DEFENDANT'S EXHIBIT F.

" DEPARTMENT OF STATE,  
WASHINGTON, February 11, 1899.

HIS EXCELLENCY THE GOVERNOR OF MASSACHUSETTS,  
Boston, Massachusetts.

SIR :

I have the honor to acknowledge the receipt of your letter of the 8th inst. relative to the extradition of the



alleged murderer Di Blasi, whose provisional detention at Palermo, Sicily, this department recently asked at your request.

As it appears that Di Blasi is an Italian subject the Department is of the opinion that it would be useless to incur the expense of sending an officer to Italy to endeavor to secure his return. Our extradition treaty with Italy provides for the surrender of "persons" charged with crime, and no express exemption is made of citizens. This government has taken the view that where no exception is expressed, in the treaty the obligation to surrender "persons" includes citizens or subjects of the contracting parties. The Italian Government, however, declines to accept this view, and uniformly refuses to surrender its subjects, usually accompanying its refusal with an offer to try and punish the fugitives in Italy, as may be done under Italian law.

I have the honor to be, Sir,

Your obedient servant,

(Signed) JOHN HAY."

(*Rec.*, p. 109).

The foregoing facts and correspondence prove the following facts. That the Italian Government, through the action of its foreign office or Executive Department, has

- A. Denied the American construction of the treaty, and
- B. So denying has refused to comply with its terms as construed by our State Department and has thereby
- C. Broken the treaty both under the legal and diplomatic construction of the same.

In other words, we have here *no dispute* between the *legal* and *diplomatic* constructions of the treaty.

For both the construction of the treaty and its breach flow from the Diplomatic Construction.

The Diplomatic Construction is made.

The Breach on that Construction is admitted and claimed by the Diplomatic or Executive part of the government.

The Breach on that construction is admitted by the other party to the treaty.

No question of fact exists.

No dispute on any question of fact exists.

Our Executive Construction of the treaty includes of necessity the breach and the breach is admitted by Italy. She, while admitting the fact of refusal to extradite under admitted facts and thereby admitting the breach, claims that the treaty does not apply to citizens of the asylum country.

In addition, the Legislative Branch of the Italian Government has admittedly broken the treaty, if the American construction be correct.

January 1, 1890, there was passed by the Italian Government a Code Penale.

(*Rec.*, p. 109.)

Article 9 of that Code reads as follows :

"9. The extradition of a citizen is not permitted (conceded—ammessa).

The extradition of an alien is not permitted (conceded—ammessa) for political offenses, nor for crimes connected with political offenses.

The extradition of an alien can neither be offered nor granted except by the government of the King, and after previous deliberation in conformity with the judicial authority of the place in which the alien is found.

However, upon demand or offer of extradition, the provisional arrest of an alien may be ordered."

(*Rec.*, p. 110.)

On or about the 7th day of June, 1910, at Moltrasio in the province of Como, Kingdom of Italy, one Mary Charlton was killed (*Rec.*, p. 20). Porter Charlton the husband of the said Mary Charlton was born in Omaha, Nebraska, September 21, 1888, both of his parents were American citizens; he is a citizen of the United States and of the State of New York; he voted in the mayoralty election in New York City in November, 1909 (*Rec.*, pp. 111 and 107).

On June 24, 1910, on the affidavit of the Italian Vice Consul in New York to the effect that a murder had been committed in Italy in that Porter Charlton had killed Mary Charlton and that Porter Charlton was charged with the crime and was a fugitive from justice the said Porter Charlton having just

arrived from abroad and landed in Jersey City a warrant of arrest was issued by the Hon. JOHN A. BLAIR, Presiding Judge of the Court of Oyer and Terminer of the County of Hudson, State of New Jersey, and thereupon said Porter Charlton was arrested thereunder and held in the Hudson County jail (*Rec.*, p. 18).

The first hearing on the extradition proceedings before the Magistrate JOHN A. BLAIR, Presiding Judge of the Court of Oyer and Terminer, of Hudson County, N. J. was on June 28, 1910.

On June 28th, the proceedings were adjourned to July 8, 1910, and by stipulation no proceedings to remove the prisoner were to be had meantime.

(*Rec.*, p. 85).

On July 8, 1910, a further adjournment on the same conditions was made to August 11, 1910.

(*Rec.*, p. 86).

On August 11, 1910 the proceedings having already been adjourned by consent to September 21, 1910—the Italian Vice Consul was in Court and presented the dossier, plaintiff's exhibit—the warrant of arrest and affidavits from the Italian Government.

(*Rec.*, p. 86).

Plaintiff's exhibit omitted in printing, see stipulation (original).

(*Record*, p. 228).

For the purposes of this appeal the following stipulation has been made.

Paul Charlton, as Next Friend of Porter Charlton, Appellant, against Gustavo Di Rosa, Vice-Consul of the Kingdom of Italy in the United States of America, *et al.*, Respondents.

It is hereby stipulated between the parties to the foregoing appeal, pursuant to Subdivision 9 of the United States Supreme Court Rule No. 10, that the United States Supreme Court Clerk shall print as a part of the record on the appeal in this case, in the place and

stead of Exhibits S-3 and S-4, the following index summary of said Exhibits S-3, original, and S-4, translation, attached hereto and marked "Exhibit X."

In consideration thereof, the appellant stipulates that he will raise no question on this appeal as to the sufficiency in the proofs before the Magistrate of the following facts, namely :

That the crime of murder had been committed in Italy ; that the said Porter Charlton was a person found within the jurisdiction of New Jersey and the United States after the commission of said crime and is the person named in said Exhibits S-3 and S-4 and charged with such crime, and that the evidence presented before the Magistrate was sufficient *prima facie* proof to establish the commission of such crime and the criminality of said Porter Charlton ; and the following assignments of error are withdrawn, namely :

Assignment of error No. 6 and so much of the objection made under Assignments of Error No. 39 and 41 as is founded upon the absence of a warrant or the absence of copies of depositions upon which the warrant issued, this stipulation being made without prejudice to the issues of law raised on the other assignments of error herein and without prejudice to the claim made by Charlton that Italy's demand for extradition in this case is a demand not under the treaty but under the comity of International law.

It is expressly stipulated that this stipulation is made only for the purpose of the appeal to the United States Supreme Court in the foregoing entitled case and is not to be used in any other action or proceeding.

Dated December 31, 1912.

R. FLOYD CLARKE,

Attorney for Appellant.

PIERRE P. GARVEN,

Attorney for Respondent."

On September 21, 1910, the case was tried before the Hon. JOHN J. BLAIR, Magistrate.

*See Transcript of Testimony & Exhibits (Rec., pp. 32-60, 89-112).*

The proceedings at this trial are given *supra*, in Part I., p. .

In addition we call attention to the following :

The hearing on said extradition proceeding before the Magistrate took place more than 40 days after the arrest ; the arrest was June 24, 1910—the hearing September 21, 1910. (*Rec.*, p. 87.)

At that hearing there was no proof of any formal demand having been made by the Italian Government on the Secretary of State or on the magistrate or any other authority for the surrender of the prisoner pursuant to the addition to Article V in 1885, and no proof of the presentation of a requisition and a duly authenticated copy of the warrant of arrest issued in Italy or of the depositions upon which such warrant issued, to any one, magistrate or Secretary of State, within the forty days—the copy of warrant and depositions being presented to the magistrate at the hearing on August 11, 1910, more than forty days after the arrest (*Record*, p. 34).

Thereafter the petitioner applied on a writ of *habeas corpus* (*Rec.*, p. 15) and *certiorari* directed to the sheriff of the County of Hudson, to the United States Secretary of State (*Rec.*, pp. 14 and 16), and to the Magistrate (*Rec.*, pp. 14 and 16), requiring the sheriff to bring up the body (*Rec.*, p. 15), the magistrate to certify the proceedings before him (*Rec.*, pp. 14 and 16) and the Secretary of State to certify the transcript of the proceedings before the magistrate filed with him (*Rec.*, pp. 14 and 16).

On the return day of the writs of *habeas corpus* and *certiorari*, December 19, 1910 (*Rec.*, 24), the sheriff produced the body, the Secretary of State returned under the writ of *certiorari* the certified copy of the transcript of the proceedings before the magistrate and the magistrate likewise returned under the writ of *certiorari* the transcript of proceedings before him.

Thereafter the District Judge handed down a decision discharging the writ of *habeas corpus* (*Record, opinion, p. 176, etc., and final order, p. 183, etc.*).

Thereafter the District Judge handed down a decision discharging the writ of *habeas corpus*.

The material portion of the demand dated July 28, 1910,

so alleged to have been presented within the forty days, reads as follows :

" ROYAL EMBASSY OF ITALY,  
MANCHESTER, MASS., July 28, 1910.

MR. SECRETARY OF STATE :

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before Your Excellency a formal request for the extradition of Porter Charlton who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II, Section I of said Convention," etc., etc. (*Record*, p. 150).

The previous communications between the governments are above outlined in Part II.

It was in view of this correspondence that the alleged formal demand of July 28, 1910, opens with the statement as above quoted :

" MR. SECRETARY OF STATE :

Referring to previous communications and in accordance with the provisions of Article V. of the extradition Convention."

A reference to the preceding correspondence proves beyond doubt or peradventure that this "*formal demand*" which on its face is changed to the words "*formal request*", is not a "*formal demand*" within the meaning of the treaty under the obligations of the treaty for the extradition of Porter Charlton. On the contrary it is, in substance a "formal request" under the comity of international law. Italy, by making this formal request, has in no manner or way whatsoever waived, nor does she propose to waive, the construction of the treaty hitherto claimed by her to the effect that "persons" does not include "citizens" of the asylum country upon whom the demand is made. In fact in this formal request she has expressly disclaimed any right under the treaty to the extradition of this

American citizen by reference in the "formal request" itself to the preceding correspondence and the positions taken by her therein.

So far as concerns the question of whether this formal request or demand was actually delivered by Italy to the State Department of the United States on the 28th day of July, 1908, as claimed, it is proper to refer to the following facts all certified to by the Hon. Secretary. Facts which appear so contradictory as to leave the matter without proof before the court.

On July 28, 1910, petitioner's counsel, stating the importance of the inquiry as to the service of the demand within the forty days under the treaty, requested to

"be advised when any such demand, accompanied by the documents mentioned in the Treaty, has been properly made on your Department" (*Record*, p. 165).

On August 2, 1910, the Department of State replied as follows :

"DEPARTMENT OF STATE,  
WASHINGTON, August 2, 1910.

MR. R. FLOYD CLARKE,  
37 Wall Street,  
New York City.

SIR :

I acknowledge the receipt of your letter of July 28th in further reference to the case of your client, Porter Charlton.

Your request that you be informed if and whenever the Italian Government shall make request upon this Department for the extradition of Porter Charlton will be complied with.

I am, Sir

Your obedient servant,

ALVEY A. ADEE,  
Acting Secretary of State."

(*Record*, pp. 165, 166).



It is now claimed that at the time this letter was written, the request in question had already been received by the Department three days prior thereto, viz., on July 30, 1910.

Repeated requests of petitioner's counsel for the production by the Secretary of State before the hearing before the Magistrate on September 21, 1910, of the certified copies of the extradition proceedings on the part of the Italian Government in initiating the proceedings, and as to this formal demand met with absolute refusal from the office of the Secretary of State, and the documents were never furnished either to the magistrate or to the petitioner's counsel.

(See Part II herein, pp. ).

On the hearing before Judge RELLSTAB on the *habeas corpus* on July 23, 1911, two certified copies of the demand were presented to the court, both certified by the Secretary of State.

The first was an alleged formal demand or request *certified under date of December 17, 1910 (Rec., pp. 26-28)*, but contained no memorandum of its receipt or file mark or otherwise, although certified December 17, 1910 (*Record, p. 27*).

The certificate to such paper on that date merely certified :

" I certify that the documents hereto annexed are true copies from the files of this Department," dated December 17, 1910 (*Record, p. 26, fol. 56*).

The second was another certified copy of the same paper, dated July 28, 1910, and certified by the Secretary of State under date of January 3, 1911 (*Record, p. 200*).

This paper (*Record, p. 149*) was certified under the following form :

" I certify that the document hereto annexed is a true copy from the files and records of this Department " (*Record, p. 149*).

and contained on its original a stamp or file mark of July 30, 1910.

## ARGUMENT.

### POINT I.

UNDER THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND ITALY, THE WORD "PERSONS", AS USED IN THE IDENTICAL RECIPROCAL COVENANT THEREIN CONTAINED FOR THE EXTRADITION OF PERSONS ON DEMAND, EXCLUDES A CITIZEN OF THE ASYLUM COUNTRY. THE ITALIAN CONSTRUCTION IS THE CORRECT INTERNATIONAL CONSTRUCTION.

The material portion of Article I. of the treaty reads as follows :

"The government of the United States and the government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crime specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other, provided," etc.

#### THE DIPLOMATIC DISPUTE AND ARGUMENTS.

The dispute in this case arose between the United States of America and Italy in the following communications between Mr. Blaine, the Secretary of State of the United States, and Baron Fava, as Foreign Minister of Italy. On March 21, 1890, Mr. Blaine wrote to Baron Fava, as follows :

"The treaties, however, require the surrender of persons generally and make no exception in favor of citizens or subjects, and I therefore deem it my duty, while transmitting the letters rogatory to the authorities of the states of Pennsylvania and New York, to reserve the right which this government thinks it possesses to have the fugitive surrendered for trial in the place where the crime was committed."

*U. S. Foreign Relations of 1890*, p. 558.

This letter led to both Diplomats presenting their arguments on the question so presented.

We extract the following from this correspondence as being particularly material.

A. Defendant's Ex. A April 20, 1890, letter from Baron Fava to Mr. Blaine.

Baron Fava says :

" It is wholly unnecessary for me to remind Your Excellency that this question has been discussed at length and entirely settled by the Royal Ministry of Foreign Affairs and the United States Legation at Rome.

Mr. Stallo must have informed the Honorable Department of State that, according to Italian law, no citizen can be removed from the jurisdiction of his natural judges, that is to say, from that of the judges of his own country ; and that, although an exception is naturally made to this principle, when a citizen who has committed a crime in a foreign country is arrested in that country, it nevertheless resumes its force when the same citizen returns to his country. The new Italian penal code, in its 9th article as well as the former code in its 5th and 6th articles, are equally explicit on this subject. They solemnly declare that 'the extradition of a citizen is not admissible.'

This system—has been adopted by a majority of the nations of Europe, and the object of which is not to alter the personal penal status of the citizen, has, during the past fifty years, been most thoroughly examined by writers of international law. All publicists agree in admitting that this principle now forms a part of public law, in virtue of which the governments of continental Europe never grant the extraditions of their own subjects.

This principle, moreover, has not only become part of the public law of Europe, but it has, I am happy to say, been recognized by the United States Government itself in the extradition treaties which it has concluded with Austria-Hungary (Article 2), the Grand Duchy of Baden (Article 2), Bavaria (Article 3), Belgium (Article 5), the Republic of Haiti (Article 41), Mexico (Article 6), the Netherlands (Article 8), Turkey (Article 7), Prussia (Article 3), and with it the German Empire in virtue of accession by subsequent treaties, Spain (Ar-

ticle 8), Sweden and Norway (Article 4), and Salvador (Article 5).

In view of the explicit provisions of the Italian law and of the practical recognition of this principle of universal public law, on the part of the governments of Europe, and that of the United States, it cannot be claimed on the ground of the lack in the treaty between Italy and the United States of an express reservation in favor of natives of the two countries, that Italy has renounced a doctrine which is based, not only on her own laws, but also on her own public law. If the negotiators of the extradition treaty of 1868 had wished to abrogate this universally accepted doctrine which has been especially adopted by the two contracting parties, they would certainly, in consideration of its gravity and importance, have stated that fact in a formal declaration, adding to the words of the first article of said treaty the following clause: 'without excepting their respective citizens.'

Under these circumstances, the government of the King is perfectly justified in declaring, as it has already done, that neither the spirit of the Italian law, nor even the text of the treaty invoked by Your Excellency, would permit it to comply with the request which has been made for the extradition of the Italian subjects, Bevivino and Villella."

(*Rec.*, pp. 119, 120.)

In this connection, we refer to Mr. Blaine's reply of June 23, 1890, set out in full in the record, pp. 121-130 (*U. S. Foreign Relations of 1890*, pp. 559-566), in which the argument on the question from the American side begins with the words :

"We are brought, therefore, to the consideration of the question whether the refusal of the Italian government to deliver up Paladini, Villella and Bevivino under the treaty of 1868 is justified by the principles of international law. The answer to be given to this question must therefore be decisive of the matter."

Then follows the argument in support of the American diplomatic construction.

See *Record*, pp. 126-130.

### The Argument on Principle.

Mr. Blaine, in his able presentation of the American side of this question, in his communication to Baron Fava of June 23, 1890 (*U. S. For. Rel. 1890, p. 559, Rec., p. 126-130*), after admitting the establishment of a custom in France and the Low Countries in the fourteenth century which was not to extradite citizens of the asylum state, says, page 564 :

“ That the example thus set has generally been followed by European states is not to be questioned ; for, with the single exception of England, it is believed that they have adopted the rule of refusing to deliver up their citizens.”

The admission concludes the fact, and it would not be difficult to show that continental Europe has established, as a principle of its international law, the rule that citizens of the asylum state are not included in extradition treaties except by express language.

Mr. Blaine's argument is that because in most extradition treaties with the United States the word “ persons ” is used, and then a clause is inserted excluding the extradition of the citizens of the asylum state, hence the word “ persons,” where no such clause exists, must mean “ persons ” including “ citizens ” of the asylum state.

In support of his claim that, under international law, citizens of the asylum country are included in an extradition treaty unless expressly exempted, Mr. Blaine states the numerous treaties between America and foreign states where the express stipulation is made that they are not to be included, and also Billot and Bernard, writers on extradition in France, and Fiore, a publicist of Italy, and two resolutions, passed at Oxford in 1881-1882, of the Institute of International Law, recommending that citizens should be included in extradition treaties,—the last authority turns out to be distinctly against the citation, for the seventh resolution says :

“ VII. Admitting it to be the practice to withdraw citizens from extradition,”

thereby recognizing the practice under international law to be contrary to the recommendation.

Again, the body in question was simply a meeting of lawyers with no public powers, recommending ethics but not determining that ethics was international law.

Again, the citation of the American treaties only indicated, as claimed by Baron Fava, that America had expressly stipulated according to the rule of international law in a number of treaties, and had thereby accepted the policy consistent with that rule, and hence was not entitled to draw from an ambiguous phrase "persons" a meaning contra to the well established continental public law on the question.

In other words, in a treaty between continental nations, not mentioning the inclusion of citizens of the asylum state, the principle of international law applicable was so well understood among them that neither could claim that any such general word as the word "persons" meant an obligation to extradite citizens of the asylum state.

Even if, at the time of the original dispute between the United States government and Italy back in 1890, the word "persons" in this treaty might have been held to include citizens of the asylum country, the practical conduct of the two governments since that time has established, as a matter of practical construction between the parties, the fact that the treaty does not include citizens of the asylum country.

### **The Practical Construction.**

Our Government has, for over ten years, abandoned its original construction that the treaty with Italy included citizens of the asylum country, as appears from the following facts :

A. Our failure for twenty years either—

To go to war about it ;

or

To demand an international arbitration ; and

B. Our refusal for the last ten years to even present a request on Italy for the extradition of her citizens ;

is an executive acquiescence in

the Italian construction

equivalent to the practical construction of the parties to a contract in municipal law, which solves the doubt in cases of ambiguity.

C. Since the final option as to whether by reason of Italy's breach of the treaty we should claim its rescission or damages is in congress and not in an executive officer—for congress alone has the power of peace and war—in the absence of congressional action for over twenty years amounting to acquiescence in the Italian construction and in the presence of the Constitutional guarantees, every intendment should be against a discretionary power in an executive officer in a case of this description.

D. Especially is this true since there is no public policy of the United States to include citizens of the asylum country in its treaties, so far as its practice in treaty-making indicates.

Thus, the Italian construction of the treaty of 1868 is founded on the claim that both the practice and principle of international law has generally recognized the right of the government to demand back from another government the citizen of the demanding government seeking asylum in the foreign country, while no such right has been generally recognized on the part of a foreign government to demand from the government of the citizen in asylum therein his extradition to the foreign country from whose justice he is a fugitive. By reason of this alleged rule of international law, underlying all treaties as the Italians claim, the Italian publicists claim that the word "persons" could not include citizens of the asylum country, because to cover such intent the wording should have been "without excepting their respective citizens."

(See Baron Fava's note to *Mr. Blaine*, *Apl. 20, 1890*, *For. Rel. U. S., 1890, p. 557*).

The extradition treaties made by the United States divide themselves into two classes :

1. Those which contain no limitation on the citizenship of the "persons" who are subject to extradition thereunder ; and
2. Those which contain definite exclusion of citizens of either of the contracting sovereignties from the operation of the treaty.

Those containing the latter stipulation are largely the most numerous, and the stipulation, in each case, is either identically or substantially as follows :

"Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this treaty."



The treaties in force with the following countries contain such a stipulation : (1)

Country.	Page.	Date.
Argentina.....	26	June 5, 1900
Austria Hungary.....	37	Dec. 15, 1856
Bavaria.....	59	Nov. 18, 1854
Belgium.....	103	Oct. 26, 1901
Bolivia.....	127	Apl. 21, 1900
Brazil.....	149	May 28, 1898
Chile.....	194	Apl. 17, 1900
Columbia.....	325	May 7, 1888
Cuba.....	369	Apl. 6, 1904
Denmark.....	393	Jan. 6, 1902
Guatemala.....	881	Feb. 27, 1903
Hayti.....	943	Aug. 9, 1904
Japan.....	1027	Apl. 29, 1886
Luxemburg.....	1055	Oct. 29, 1883
Mexico.....	1186	Feb. 22, 1899
Netherlands.....	1269	June 2, 1887
Nicaragua.....	1295	Mch. 1, 1905
Norway.....	1303	June 7, 1893
Ottoman Empire.....	1343	Aug. 11, 1874
Panama.....	1359	May 25, 1904
Paraguay.....	1447	(No treaty)
Peru.....	1447	Nov. 28, 1899
Portugal.....	1472	May 7, 1908
Prussia (Germany).....	1503	June 16, 1852
Russia.....	1529	Mch. 28, 1887
San Marino.....	1598	Jan. 10, 1906
Servia.....	1624	Oct. 25, 1901
Spain.....	1715	June 15, 1904
Sweden.....	1783	Jan. 14, 1893
Switzerland.....	1772	May 14, 1900
Uruguay.....	1828	Mch. 11, 1905

(See official compilation *U. S. Treaties Senate Document 357, 61st Congress, 2nd Session.*)

(1) This compilation was made in 1910; there have been a few changes since not affecting the argument.

To these must be added the treaty just proclaimed August 26, 1910, between the United States and the Dominican Republic.

Its first article contains the reciprocal engagement—

“to deliver up to justice any person who may be charged with \* \* \* certain specified crimes.”

Article VIII. reads as follows :

“Article VIII. Under the stipulations of this Convention, neither of the contracting parties shall be bound to deliver up its own citizens or subjects.”

From the above it will be noted that in our relations with thirty-one foreign nations, we have specifically agreed to except their citizens from demand for extradition, and have taken the same stipulation with relation to our own.

Of the other nations with which we have treaties of extradition in force each agrees to deliver up, under fixed conditions, “persons” convicted of, or charged with, certain enumerated crimes ; in the treaty with England it is mutually stipulated that “all persons,” etc., shall be delivered.

The following is a list of the countries with which we have such treaties in force :

<i>Country :</i>	<i>Page :</i>	<i>Date :</i>
Ecuador.....	436	June 28, 1872
France.....	526	Nov. 9, 1843
Great Britain.....	656	July 12, 1889
Dominican Republic.....	413	Feb. 8, 1867
Italy.....	966	Feb. 8, 1868
Venezuela.....	1854	Aug. 27, 1860

The foregoing treaty with the Dominican Republic has been superseded by the recent one of August 26, 1910, expressly excluding citizens of the contracting parties from the operation of extradition.

So that, with only five foreign nations have we treaties providing for the delivery of “Persons,” and Italy refuses to recognize “persons” as including citizens of the asylum country.

In the case of Great Britain, the statement of the word "all" makes the meaning clear.

France also, in her treaty, refuses to recognize "persons" as including citizens of the asylum country.

It does not appear that the precise question has arisen between us and either Ecuador or Venezuela.

It follows that there is no political policy of the United States requiring that extradition treaties shall include citizens of the asylum sovereignty.

#### ITALY'S REPEAL OF THE TREATY SO FAR AS IT AFFECTED CITIZENS OF THE ASYLUM COUNTRY.

E. On principle, from the time of the Italian abrogation by the passage of the Penal Code of 1890, the treaty, so far as it concerns citizens of the asylum countries, did not exist as between the governments as a matter of fact and of international law. In other words, the treaty no longer existed *qua* treaty.

By the very nature of the subject matter, the treaty did not continue in existence, for—

Its operation was at least suspended until by war or decree of an arbitral board the true construction of its terms could be discovered.

Next, even an arbitration could not keep it in existence beyond a remedy for damages, because its termination by legislative act of Italy was within the recognized doctrines of international law.

Pending the arbitral decision, it could not be in operation or in existence, and no arbitral decision could go beyond the award of damages.

Next, a war, even if resulting in new engagements amounting to an obligation to continue the treaty, would only result in a new treaty.

Pending the war, the treaty is not in operation and is non-existent as a treaty.

In consequence, the abrogation of an extradition treaty by one party is in effect an abrogation by both—for, pending the war or arbitration, no extradition treaty exists.

The Supreme Court of the United States, in the Chinese Exclusion Cases and other decisions has laid down the rule as

a rule of municipal and international law that treaties and statutes being equal manifestations of the law making power, the one that is last in point of time is the controlling enactment.

The Italian Government having passed its Penal Code of 1890 subsequent to the treaty of 1868, or any later amendment thereof, and said penal code prohibiting the extradition of an Italian citizen, such statute is controlling and repeals so much of the treaty as made the word "persons" include citizens of the contracting governments. The act in effect denounces the treaty so far as it could be construed to apply to citizens of the contracting governments. This leaves the international situation such that the treaty, so far as it applies to citizens of the contracting governments, is denounced by the subsequent action of the Italian Legislature, and no longer remains a treaty covering citizens of the asylum state as between the two governments.

The United States, being bound by the decision of the Supreme Court as to the doctrine of municipal and international law that a treaty may be denounced or repealed by statute, is not in a position, after failing to go to war or to demand arbitration, and after refusing to make further demands on the Italian government under its construction of the treaty, *to further claim that the Italian Government is, since the enactment of the Italian Penal Code, in treaty relations with the United States covering citizens of the respective countries in asylum therein.*

In other words, having established as the doctrine of our own municipal and international law that the solemn treaty obligations of the United States are repealed and denounced by a subsequent statute passed by a legislative body and from that date have no effect as a treaty, we must give equal weight to the like repeal of a treaty by the legislative body of Italy.

The result is that on the passage of the Italian Penal Code containing this prohibition against the extradition of Italian citizens, the treaty of 1868, *so far as it could be held to apply to citizens of the asylum country*, became and was repealed and annulled, and from that time the treaty no longer existed so as to cover a case such as the present.

*This leaves unaffected under doctrines of international law*

*the right of the country whose treaty has thus been broken to maintain its contention thereafter either by war or arbitration for damages for the breach of the treaty.*

The point is that *ipso facto* the treaty ceased with the denunciation—there being no such thing as a specific performance of a treaty obligation except in the form of damages from an arbitration decision, or reparation by war.

The foregoing would be true even had the United States proceeded to attempt to assert its right under the treaty either by war or arbitration, for the treaty would have been broken and would have ceased to exist as a treaty with the passage of the Italian act. But, as a matter of fact, the United States, by its Political Department, did not further press its construction of the treaty, but, on the contrary—

A. Did not make war by reason of the alleged breach on the construction adopted by the United States ;

B. Did not demand an international arbitration on the question of construction involved ;

C. On future requests of its own citizens to its Executive Department for the purpose of obtaining the aid of that department in demanding the extradition of Italian citizens guilty of crimes in America and fleeing from justice to the asylum of Italy, has since refused to even make the request or to take further proceedings in the matter (*See letter of John Hay, dated February 11, 1899, Dept's Ex. F*). In consequence, the State Department of the United States of America has in effect abandoned its former construction of the treaty and acceded to the Italian view.

The result is that since the passage of the Italian Penal Code of 1890, there has been *no treaty of extradition* between the Government of the United States and the Government of Italy covering the right to extradite a citizen of the United States committing a crime in Italy and fleeing from justice to the asylum of the United States, or vice versa.

## POINT II.

Assuming that the word "Persons" in the treaty includes citizens of the asylum country under the diplomatic dispute between the two countries as to this construction establishing, on the construction claimed by the United States, a clear, admitted breach of the covenant on the part of Italy through its executive and legislative branches (the latter through the passage by Italy of its penal code forbidding extradition of Italian subjects subsequent to the ratification of the treaty) and the refusal of Italy on many occasions to comply with the requests of this country demanding the extradition of Italian subjects committing crimes here and fleeing for asylum to Italy, and the abandonment for over thirteen years by this country of any further attempt to obtain extradition in such cases, even though requested by the governors of states—a citizen of the United States accused of committing a crime in Italy and found here cannot, under the provisions of the treaty and the laws of the land, be extradited by the mandate of the executive.

### Part I.

#### THE TREATY CONSIDERED AS A CONTRACT.

##### A.

*Under the Imperfect obligation of International Law the Executive has no power to extradite a citizen.*

On the admitted breach, the obligation on the sovereignty to extradite becomes one of imperfect obligation equivalent to

the imperfect obligation under international law where no treaty exists.

The following propositions are settled law :

1. Where the obligation to extradite rests upon the express provisions of a treaty or statute of Congress, the executive has full power to deport the citizen or alien involved.

2. Where the obligation to extradite a citizen on demand of a foreign government rests upon the imperfect international obligation under the comity of international law and not upon an obligation of a treaty or statute of Congress covering the case, the arbitrary discretion thence arising to deport or not to deport is one which cannot be exercised by the executive.

It is settled law in this country that, under our constitutional limitations, no power exists in the executive to extradite a citizen unless such extradition be required by—

A. The obligation of a treaty of extradition; or

B. A statute of Congress requiring the same.

For the detailed proof of this premise, we refer to the Appendix to this brief.

## B.

*Where the Treaty itself leaves it optional so to do the executive has no power to extradite a citizen.*

3. On the same principle it has been ruled that not only must the treaty or the law exist, but there must be an obligation under it to extradite, or express words of the legislative body granting to the executive the power to act.

*Ex parte McCabe*, 46 Fed., 363.

In that case Article 1 of the treaty with Mexico was a reciprocal covenant that the governments would, on requisition, "deliver up to justice persons" committing crimes, etc.

The last clause in the treaty provided,—

"Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty."

It was argued that since the contract was to deliver up and the last clause only excepted citizens from the obligation,



there was here by implication granted an option to the executive to deliver.

This construction was held to be untenable because of the existence of the "due process" clause protecting a citizen from the exercise of arbitrary discretion by an executive officer.

4. It is conceded that Congress can, by express words covering the conditions, grant to the executive the power to exercise this discretion under an extradition treaty. Such a grant is contained in the latest extradition treaty with Mexico.

### C.

*Where the original obligation of the Treaty has been dissolved by the clear and admitted breach of the other Government, leaving no obligation save the imperfect obligation of International Law, the executive has no power to extradite a citizen.*

In the case in hand, however, we have the distinguishing facts that an obligation of a treaty has once existed to surrender the citizen; that by reason of the admitted breach of the treaty by the other government, the international obligation once existing has become dissolved, and the remaining obligation on this sovereignty to comply with the provisions of the treaty is an imperfect obligation both under international and municipal law of equivalent character and kind to the imperfect obligation existing under international law of comity where no treaty exists.

The option thence arising in this sovereignty to deport or not to deport is an arbitrary option resting only upon comity of international law and not on the treaty itself as a binding obligation.

Since the option to exercise the right of deportation of a citizen on demand of a foreign country under the comity of international law is an imperfect obligation amounting to an arbitrary discretion, and under our constitutional limitations cannot be exercised by the executive in the absence of a treaty or statute obligation, so in this case the same principles apply to the case of the imperfect obligation under international law

where a treaty once has existed but is admitted to have been and is declared to be broken by the other government, resulting under municipal and international law in a dissolution of the formerly existing international obligation.

Under the facts of this case, Congress not having delegated to the executive its powers in the premises, no power exists in the executive, in view of this imperfect obligation, to exercise the arbitrary discretion thence arising to deport or not to deport according to the treaty, an arbitrary discretion equal to and similar to that existing under international law where no treaty yet exists.

For no valid distinction can be drawn between the class of imperfection of the obligation to extradite, between the class of cases where no treaty yet exists and the class of cases where a treaty having existed an admitted breach has dissolved the original international obligation once existing and left it only an imperfect obligation, an arbitrary option, the same as exists under the comity of international law.

#### THE OBLIGATION OF THE COMITY UNDER INTERNATIONAL LAW AND THE MEANING OF "DUE PROCESS" OF LAW IN THIS CONNECTION.

Under the doctrines of municipal and international law, in the absence of a treaty obligation to surrender persons fleeing to this country for asylum after committing crimes in another, there is no obligation under international law, on the part of the sovereignty, to accede to the request for extradition.

There is, however, an option in the sovereignty under the doctrines of municipal and international law, as a matter of comity and courtesy, to surrender a criminal.

While the power to exercise this option resides in the sovereignty, in the countries such as the United States of America and England, whose executive is bound by constitutional limitation, the right to exercise this discretionary option in contravention of the liberty of the citizen is confined to the legislative power and does not exist either in the executive or in the courts.

It is settled law in this country that the rules of inter-

national law, except as modified by statutes or treaty, are a part of the municipal law of the land.

Kansas vs. Colorado, 206 U. S., 469.

The Charming Betsey, 2 Cranch, 64 ; 2 L. Ed., 208.

The Nereids, 9 Cranch, 388 ; 3 Law Ed., 769.

Hilton vs. Guyot, 159 U. S., 113 ; 40 L. Ed., 95.

The Lottawanna-Rodd vs. Heart, 21 Wall., 558 ;  
22 Law Ed., 654.

The Paquet Habana, 175 U. S., 677 ; 44 L. Ed., 320.

It is also settled law in this country that "*due process of law*" in our constitutional limitation means the same thing as "*law of the land*."

Davidson vs. New Orleans, 96 U. S., 97 ; 24  
L. Ed., 616.

This means a law operating on all alike, and which does not subject the individual to an arbitrary exercise of the powers of government.

Giozza vs. Tiernan, 148 U. S., 657 ; 37 L. Ed., 599, except where the law making power, in view of the conditions by express terms in the statute, has granted the discretion to an executive officer.

Ekiu vs. U. S., 142 U. S., 651 ; 35 L. Ed., 1146.

The last case held that an act in regard to emigrants empowering the inspector of emigration to decide as to the right of an alien to land is constitutional, and that his decision, made final and conclusive by the act, can not be impeached in the courts except according to the act.

This was followed by the decision in

U. S. vs. Jutoy, 198 U. S., 253 ; 49 L. Ed., 1040, in which it was held that the constitutional guarantee of "*due process of law*" is not infringed by the provision of the Act of August 18, 1894 (28 Stat. at L. 372, 390, Ch. 301, U. S. Comp. Stat. 1901, p. 1303) Sec. 1, making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the federal courts on *habeas corpus* proceedings in the absence of any abuse of authority even where citizenship is the ground on which right of entry is claimed.

But this latter case, in which Justices BREWER, PECKHAM and DAY dissented, has been since limited and distinguished in *Chin Low vs. U. S.*, 208 U. S., 8; 52 L. Ed., 369.

The latter case held—

“*Habeas corpus* should be granted by the federal courts to a Chinese person, claiming to be a citizen of the United States, who has arbitrarily been denied such a hearing and opportunity to prove his right to enter the United States as the exclusion acts demand, and has been placed in custody of a steamship company, to be returned to China, pursuant to the decisions of the commissioner of immigration and the Department of Commerce and Labor.”

The petition in that case claimed that on the hearing before the commissioner, the petitioner was prevented from obtaining testimony, including that of many witnesses, and given no proper opportunity to prove his citizenship in the United States, and the question was whether he was entitled to a writ of habeas corpus:

The court says, p. 12:

“As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner’s fiat, on the other, when one or the other must give way, the latter must yield.”

As an instance of a case where arbitrary discretion granted to the Board of Supervisors as to granting licenses for laundries under certain conditions was held to be a violation of the “*due process of law*” clause, see

*Yick Wo vs. Hopkins*, 118 U. S., 356; 30 L. Ed., 220.

The foregoing cases are cited as showing the strength of the “*due process of law*” clause even as against a discretionary

power expressly and properly granted by congress under the circumstances arising in the matter.

As in the case in hand there is no grant from congress or the treaty making power of the arbitrary discretion to determine the option of affirmance or disaffirmance of the treaty arising from the admitted breach by Italy, these cases apply *a fortiori* to preclude such an arbitrary right in an executive officer.

It follows that where no treaty obligation exists, the option arising under municipal and international law to extradite a person on demand of a foreign country, while it exists in the sovereignty, can not be exercised by that portion of the sovereignty embracing the executive and judicial departments, since the vesting of such arbitrary discretion in an executive officer would be contrary to the fundamental principles of our constitution.

See appendix.

The rule means that not only must the treaty or the law exist, but that there must be an obligation under it to extradite; or express words conferring on the executive the power to act.

*Ex parte McCabe*, 46 Fed., 363.

The former law being thus clear, the only question presented in this case is as follows :

Does the fact that a treaty was once entered into between the governments which, under the American construction, embraced an obligation to deliver citizens of the asylum countries, and the fact of the admitted breach of that covenant by Italy, relieving the United States, as a matter of law, from the obligation of the treaty, constitute such a distinction in the facts as to prevent the operation of the former rule which was that an arbitrary discretion existing in the sovereignty to extradite under the doctrines of municipal and international law could not, in view of our due process clause, be exercised by an executive officer contrary to the rights of a citizen ?

It is evident that both sets of facts are identical in the following particulars, namely :

A. Where no treaty exists, there is imperfect obligation

under international law resulting in an arbitrary discretion to extradite or not to extradite existing in the sovereignty both under municipal and international law.

B. Where the treaty has existed, but has been admittedly broken by the other party, there is likewise an imperfect obligation resulting in an arbitrary discretion to extradite or not to extradite existing in the sovereignty by both municipal and international law.

It follows that unless some distinction be raised in the facts, the former law is applicable to the case in hand, and the executive has no power to extradite.

The distinction claimed is as follows :

A. Because a treaty once existed, which was binding, the fact that Italy has broken the treaty by an admitted breach of the covenant, although leaving an imperfect obligation and an option under international law in the sovereignty to accede to or refuse her demand for Charlton's extradition, leaves the treaty in force as a municipal law of the land obligatory on Secretary Knox to surrender Charlton until such time as the treaty shall be abrogated by the express action of our own sovereignty.

And mingled with this construction is the claim that the alleged diplomatic construction to the foregoing effect can not be inquired into or rejected by the courts as bearing upon the true construction of the rights of the executive officer acting under the alleged treaty and of the citizen.

The latter contention is sufficiently answered by the two cases of—

United States vs. Rauscher, 119 U. S., 407 ;

and

Chin Low vs. U. S., 208 U. S., 8 ; 52 L. Ed., 369.

These last cases clearly hold that it is both the province and the duty of the court to construe the treaty, if necessary, in defiance of the diplomatic construction where the facts are admitted.

The former point amounts to a claim that a treaty, although broken as a contract and no longer obligatory on the sovereignty, yet remains as an obligatory law of the land until the political power has denounced or abrogated it.

Before going into the argument of this latter point, let us establish the facts as showing—

**1st :** That no fact of any kind is disputed in this controversy, so that it becomes a question of pure law under the Rauscher case ;

**2nd.** That the treaty, as it existed, was a reciprocal covenant arising out of identical words allowing no difference in the obligation imposed upon each country ;

**3rd.** That the breach of the obligation by Italy is an admitted and undeniable fact, established by the diplomatic contentions of both parties, if the American diplomatic construction of the treaty is correct.

In other words, either the breach exists and is conclusively admitted to exist as a fact without dispute or qualification, in which case we must determine as a matter of law what the true construction of the situation is, so far as concerns the liberty of the citizen, or, if the breach does not exist because the Italian construction is clear, then Charlton is entitled to his liberty.

In the case in hand we have a treaty made with Italy in 1868, in which a reciprocal covenant on the part of either government is raised by identical words in the treaty.

Thus, the preamble reads :

“The United States of America and His Majesty the King of Italy, having judged it expedient \* \* \* that persons convicted of or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up, have resolved to conclude a convention for that purpose. \* \* \*

#### ARTICLE 1.

The Government of the United States and the Government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other ” etc.



Since the covenant on the part of either party is contained in identical language, the words can not mean one thing for Italy and another thing for the United States.

The identical word "persons" must mean the same thing for the United States as it does for Italy in a reciprocal covenant so expressed, and

A. If "persons" means persons excluding "citizens" of the asylum country, the Italian construction, then there is no treaty covering Charlton, who is a citizen of the United States, the asylum country, and he must go free.

B. If "persons" means "citizens" of the asylum country, and the American construction of the reciprocal covenant is the correct construction, then

The treaty as written and as properly construed as a covenant to surrender citizens of the asylum country on the part of the respective governments has been broken by Italy—

(a) By Italy's diplomatic refusal on repeated requests from the United States to surrender Italian citizens committing crimes in the United States and seeking asylum in Italy; and

(b) By the passage of the Italian Penal Code expressly prohibiting the extradition of Italian citizens.

*Treaties may be Broken by Inconsistent Legislative or Executive Action.*

It is settled law of this country, both municipal and international, that a treaty may be broken—

A. By inconsistent legislative action.

The Chinese Exclusion Cases, 130 U. S., 581, 599.

The Chinese Deportation Cases, 149 U. S., 730.

5 Moore's Dig. Int. Law, p. 366, Sec. 776.

We who have exercised the right at least five times

(See—

French Act of 1798, 5 Moore Dig. Int. Law, pp. 356, 357.

The Chinese Exclusion Acts, 130 U. S., 581, 599.

The Chinese Deportation Acts, 149 U. S., 698, 763.

Eddye *et al.* vs. Robertson, 112 U. S., 580, 600  
(The Head Money Tax Cases).

(The Exchange Case) 7 Cranch, 116, 136)

and who claimed that our act of 1798 repudiating our obligations under the French Treaty operated both municipally and

internationally, are not now in a position to deny a similar power in the Italian sovereignty.

5 Moore Dig. Int. Law, 357.

B. By inconsistent executive action.

For we have consistently maintained that a sovereignty is bound in its international relations by the action of its executive independent of its legislative powers.

The Prize Cases, 67 U. S., 635 ; 7 L. Ed., 459.

Dana's Wheaton, Sec. 543, Note 250, citing 1 Kent, 165.

Heffter, Sec. 84, Vattel LIV., LV.

C. 2, Sec. 14.

Wharton's Dig. Int. Law, Sec. 131, a II.—20.

5 Moore's Dig. Int. Law, Sec. 759, p. 231.

Halleck, 854.

See our arguments against the Spanish Government in the case of Mora's claims against Spain.

6 Moore's Dig. Int. Law, pp. 1017-1021.

*Distinction Between Admitted and Disputed Breach.*

This is not a case where a breach of the treaty on the part of the foreign government rests upon a doubtful or disputed question of fact.

It is not a case where doubt exists as to the breach, because—

A. Our diplomatic officers up to 1894 claimed that a breach had been committed by reason of our construction of the treaty and Italy's failure to conform thereto.

B. Italy frankly avows its action contrary to the American interpretation, distinctly disclaims the validity of that interpretation and its insistence upon conduct which is a breach, if the American interpretation is correct.

While in a case of a breach of a treaty which is doubtful in fact or which is disputed as a fact, it may be admitted that the courts have no jurisdiction as against the action of the political department of the government, it is submitted that an entirely distinct question arises where, as in this case, there is no dispute about the facts, there is no dispute about the breach, the breach is, as a matter of fact, admitted,

and is plain, and the court is merely called upon to declare what the law of the situation is under the true construction of the treaty as applied to the facts afterwards arising constituting the admitted breach.

It is settled law that although the judicial department has no treaty making power or legislative power, it is still the peculiar province of that department to construe treaties and statutes.

In—

Wilson vs Wall, 6 Wall, 83, 89,  
the court said :

“ But congress has no more power, it is said, to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary when a case shall arise between individuals.”

*The Question is Judicial not Diplomatic.*

The leading case on the subject is that of

U. S. vs. Rauscher, 119 U. S., 407.

There, Rauscher, having been extradited from England under the treaty on a charge of murder, was convicted in the United States Circuit Court in New York on a charge of assault with intent to commit murder. A controversy of many years standing had existed between the diplomatic departments of the United States and of Great Britain in regard to this issue. The United States had claimed that, although extradition was taken for one crime, the person extradited could be tried here for any other crime. Great Britain had insisted to the contrary. On *habeas corpus* to the United States Supreme Court, after the conviction of Rauscher for a crime other than that on which he was extradited, the contention was pressed upon the Supreme Court that the court was bound by the construction placed upon the treaty by the diplomatic department.

The court overruled this contention, ruling that where the right of personal liberty was involved, it was the duty of the court to construe the treaty as a law of the land and to ascer-

tain its true construction and to enforce it even contra to the construction placed upon it by the political departments.

The court held, under doctrines of justice and international law, that the English construction was the correct construction and freed the convicted criminal.

If, then, the diplomatic construction of the facts arising in this case is that Italy has committed no breach of the treaty, the answer is that that construction is so clearly a construction in defiance of international and municipal law and common sense as to be one which must be rejected by the courts under their power so to do established by the Rauscher case.

It follows, therefore, that the breach by Italy is established and conclusively admitted, and is a fact which cannot be denied, and from which conclusions of law follow to be drawn by the court.

This fact of the admitted breach of the treaty on the facts appearing in the case is a distinguishing fact which distinguishes this case from all other cases where the construction of treaties has been involved.

Facts arising in cases under tariff treaties bear no likeness to the facts in the case in hand, because there the facts as to the breach have been in dispute, namely, the likeness or unlikeness of the Australian and Bombay wool, for instance.

So, facts arising under the treaty with England preserving creditors' claims are unlike because the alleged breaches were not only not admitted, but had been cured by a subsequent treaty.

*As Shown Hereafter Extradition Treaties Stand in a Class by Themselves for the Reasons Hereinafter Stated.*

Again, the facts arising in the Behring Sea case—

*In re Cooper*, 143 U. S., 472, 499,

are not in point for the following reasons :

That case involved the seizure of a vessel engaged in seal killing beyond the three mile limit at a time when the diplomatic dispute as to the American rights in fur seals derived from Russia was pending, which led afterwards to the great seal fishery arbitration.

The court distinctly refused to pass upon the question involved, deciding the case solely on the principle that the writ

of prohibition having been brought after judgment, brought up merely the record and not the evidence, and consequently the place of the seizure appeared clearly to be within the jurisdiction namely three marine leagues and not without the jurisdiction.

The further remarks on the main question involved are merely *obiter dicta*, and the court was careful to add words which appear to be prophetic of protection to the rights involved in this case as follows :

" We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of Acts of Congress or of a treaty, and the case turns upon a question, public in its nature, *which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the Executive to do so*, to render judgment, 'since we have no more right to decline the jurisdiction which is given than to usurp that which is not given.' "

*In re Cooper*, 143 U. S., 472, 499.

Again, the claim of the United States to jurisdiction in the fur seal fisheries matter was not only based on the alleged transfer from Russia of space involving the high seas, but also on the much more tenable proposition, and the only one which was seriously urged before the arbitration tribunal later, that fur seals were not *feræ naturæ* but in the nature of domesticated animals in which a right of property existed on the owner of the fur seal islands, etc., allowing the owner to recover his property beyond the jurisdiction.

It is to be noted also that when, later on, pursuant to the fur seal arbitration and the decision of the arbitrators, both contentions of the United States had been rejected and the question squarely arose in the case of

The *La Ninfa*, 75 Fed., 513 (C. C. A., 1896); 44 U. S. App., 648 ;

where, after the award under the treaty of arbitration, a fur sealing vessel owned by a citizen of the United States was seized beyond the three mile limit and the contention was

made that the executive department of the government still claimed the right to make such seizures, in any event, as against their own citizens, the court held that the award of the arbitrators under the treaty became the supreme law of the land and was as binding as an act of congress and controlled the political construction of the State Department, and that whatever had been the contention of the government at the time *in re Cooper* was decided, the facts occurring since disposing of those contentions under the award were facts which the court must consider and draw the legal conclusion from independent of the diplomatic construction.

The point here insisted upon is that an admitted breach of a treaty is just as binding on the court as a fact from which the legal conclusion of the court must flow as an award of arbitrators determining that a breach has occurred.

In other words, any diplomatic or political construction which would say that in spite of this admitted breach of the treaty there still existed an obligation on the part of the sovereignty to comply with Italy's demand is a construction which is not binding upon this court—the question on the admitted facts being one of pure law, justice and reason, not to be foreclosed by the fiat of an executive officer as against the rights of the citizen under the constitutional limitation.

So much for the alleged diplomatic or constitutional construction that when an admitted breach of a treaty occurs, an obligation still exists on the sovereignty to comply with the provisions of the treaty.

Again, it must be borne in mind that the facts of this case are absolutely novel, that never before have the exact facts presented in this case, involving the rights of an American citizen under constitutional limitations and dependent upon construction of an extradition treaty been presented to this court,—

The case nearest to this case in facts being that of—

*Ex parte McCabe*, 46 Fed.,

which, so far as it applies, is in favor of the construction claimed by petitioner's counsel.

*So much for the establishment of the conclusion that the breach of the treaty after its promulgation determines the legal obligation of the United States government to act under it and*

*results in an imperfect obligation under International law and leaves an arbitrary option in the Sovereign to affirm or dis-affirm it.*

We now take up the alleged diplomatic construction that though a breach has occurred and is admitted to have occurred, the treaty, although not binding on the United States as a contract, is still an existing law of the land binding upon the executive officer until the treaty has been abrogated by express action of the political department, congress or the executive.

This is the alleged diplomatic construction indulged in in this case below to overcome the rights of the citizen under the constitutional limitations, and the question is now before this court for the first time whether the court is bound by this diplomatic construction, or, under the Rauscher case and others, has full power to investigate its reasonableness and common sense.

Note that in order to hold the prisoner, this diplomatic construction must go to the extent of claiming that, although the breach exists and is admitted, and although the United States is not obliged internationally to comply with the treaty as a contract upon Italy's demand, it is yet obliged to act according to the treaty as a law of the land on Italy's demand.

For if it is admitted that the United States is not bound to act on Italy's demand—then congress having nowhere granted the arbitrary discretion on the facts existing to deport or not to deport to an executive officer—the executive has no power.

The claim of this diplomatic or political construction must, therefore, be as follows :

It is true a breach is admitted.

It is true the United States is not obligated, on Italy's demand, to act under this treaty as a contract internationally ; but it still remains true that the United States is obligated to act under this treaty as a law municipally and hence the executive has power and must exercise it.



## Part II.

### THE TREATY CONSIDERED AS A LAW OF THE LAND.

*But Point II. insisted upon herein involves two bases before it can be true : First, that the breach of the treaty of extradition by Italy dissolved the international obligation and left an arbitrary discretion in the sovereignty to act on or refuse a request for extradition ; and, second, that, in the case of an extradition treaty, being a treaty of a peculiar nature and class, the dissolution of the international obligation in effect dissolved the force of the treaty as a law of the land binding on the sovereignty and its alter ego, the executive.*

Under the foregoing authorities and arguments mentioned in Point II., Part I., and the appendix hereto, it cannot be successfully disputed that the first premise above outlined, namely, that under the circumstances of this case the extradition treaty with Italy is no longer binding on the sovereignty is true.

The point has, however, been successfully taken below to the effect that, admitting the breach of the treaty and admitting the conclusion from the breach of the treaty that the United States government is no longer bound by the treaty as an international compact, it yet remains that, under the dual nature of a treaty as being both a contract and a law of the land, although there is no obligation on the part of the Honorable Secretary to extradite this man on Italy's request under the international compact, because of Italy's breach, yet the Honorable Secretary is empowered and obligated to obey the treaty in its dual capacity as a law of the land and to extradite him pursuant to a request from Italy.

On this point, the argument is that, although the treaty has been broken and abrogated by Italy, it still remains a law of the land which must be observed by Americans including the Hon. Secretary until Congress has acted in the premises by denouncing or abrogating it.

## Reply

*To argument that although treaty is broken internationally it is still binding on the executive as a law of the land until abrogated by Congress.*

The objection has force and at first blush appears to be valid. But its apparent force and validity continue only so long as we fail to analyze the difference in fact between the nature of the acts, the character of the persons who do the acts called for to be done in the covenants of an extradition treaty, and the capacity in which such persons act, as distinguished from the nature of the acts, and the character of the persons who are called upon to do the acts, and the capacity in which they do the acts called for to be done in the covenants of other classes of treaties.

The objection would be substantially true as an objection if applied under similar conditions to treaties of different classes, such as customs treaties or boundary treaties—that is, treaties requiring acts to be done under them by citizens or aliens or subordinate officers of the contracting countries who, at the time required to do the act, are not, by virtue of their position as representatives or *alter egos* of the sovereignties involved, in a position to exercise the option which is in the title of the sovereignty.

### *Extradition Treaties a Class by Themselves.*

Our point here is that on the facts and the covenants in them, extradition treaties are a class by themselves, and that the rule of law which we insist upon as applying to this class is a rule of law which would not be applicable to treaties of other classes involving different states of facts.

It is the nature in fact of the act to be done, the person who is required to do it, and the capacity in which he acts under an extradition treaty, as distinguished from the acts to be done, and the persons who are to do the acts, and the capacity in which they do the acts under treaties of other classes, which makes the rule of law applicable to the extra-

dition treaty different, because of this difference in facts, from a rule of law which would be applicable to the ordinary class of treaties.

Thus, assume a case of a customs treaty requiring that the duties on imported goods should not be more on Italian products than on a similar class of goods in a customs treaty with the most favored nation. Assume that such a treaty was broken by such a diplomatic correspondence as occurred in this case. Assume that Congress and the executive had never acted to abrogate, and that, in addition, the executive had never handed down to the subordinate officers of the government (having no discretionary powers) any commands with reference to whether the old or new rules should be established at the ports. What would then be the duty of subordinate officers of the government and of citizens or aliens entering the ports with dutiable goods? Why, it is plain that under such conditions the treaty, although broken internationally, would still, as a law of the land, be applicable to govern the acts of these underlings and citizens or aliens having no power in the premises, until such time as the competent authority in the sovereignty, the executive or Congress, should act and give directions.

But it is respectfully submitted that the facts of the acts required to be done under an extradition treaty, and the fact of the person who does them, *and the capacity in which he acts*, brings that treaty into a separate class, distinct and *sui generis*, to which an entirely different rule must be applied unless all material distinctions of fact between the two cases are to be ignored.

The act to be done under an extradition treaty is a simple act. From first to last, it is the government, the sovereignty itself through its *alter ego* the executive, the State Department or the Foreign Relations Department of the respective governments which must do the act required, the carrying out of the act being, of course, left to subordinates under such directions.

Here is a very different proposition from the case of treaties where the act required to be done is one which comes up for the doing between the underlings in the government having no power as the *alter ego* of the sovereignty to act as such, or citizens or aliens having no authority in the premises.

Implied in the statement below that, although Italy has

broken the treaty, the treaty is yet binding on the Honorable Secretary of State as a law of the land until Congress or the Executive power shall act to denounce the same, is the following proposition of alleged fact, namely :

That under the conditions arising in this case of an admitted breach of the treaty dissolving the international obligation but leaving the treaty still operative as a law of the land until denounced or abrogated by the congressional or executive authority, the act required to be done by the Honorable Secretary of State in deporting this citizen on the demand of the Italian Government is an act done by the Honorable Secretary of State as a citizen of the United States Government bound to obey the law of the land as he finds it in the statute book.

Only if this fact be true, namely, that in acting under this demand from Italy, the Honorable Secretary of State is acting as a citizen obeying the law of the land, is the conclusion that he is empowered and obligated in the premises to do this act and has no arbitrary discretion in the matter under the law of the land, valid.

Now if, as a matter of fact, the Honorable Secretary, in receiving and acting on the demand of Italy under the extradition treaty in this case, is acting not as a private citizen of this government bound to obey the law of the land as he finds it in the statute books, but as the *alter ego* of the sovereignty itself, himself the head of the executive branch (as the *alter ego* of the President) the Executive Head, and vested as such with all the powers of the sovereignty vested in the executive head, including the power, where no constitutional limitations prevent, in its arbitrary discretion of acting or not acting on this demand under the obligations of municipal and international law, then the whole argument above stated to the effect that the Honorable Secretary is bound to obey the treaty as a law of the land although not bound to obey it as an international compact, falls to the ground. For in this essential fact that he, the Honorable Secretary, in receiving and acting on such demand from the Italian Government in this case, is acting not as a citizen of the United States bound to obey the law of the land as he finds it in the statute book, but is acting in his capacity as the *alter ego* of the sovereignty itself, not bound to comply with this demand because not

internationally bound to do so by reason of the breach of the treaty as a contract, *lies the crux* of the whole question. For since, in fact, the Hon. Secretary acts as and for the sovereignty in his capacity as the executive head of the nation *pro hac vice*, in obeying the request for extradition, and not as a citizen, he is under no more obligation to obey the treaty as a law than he is under obligation to obey it as a contract.

In other words, the sovereign, by reason of the breach, is not bound by the treaty as an international compact to comply with its terms, and under the circumstances cannot, when not so bound by international law, be bound by municipal law to do that which is an imperfect obligation under international law. For the act required to be done is an act in international relations and not an act in municipal relations, and if the sovereign is not bound to do it internationally, it can not be bound to do an international act in obedience to its own municipal law based on and identical with the broken international obligation.

Now the true fact is that the Secretary, in responding to Italy's demand under this treaty, acts not as an American citizen bound to obey the treaty as a municipal law found in the statute books, but acts as the sovereign itself imperfectly bound in the premises only by the comity of international law by reason of the breach and having the arbitrary discretion to deport or not to deport except as limited by constitutional limitations.

It follows that the sovereignty is not bound to respond to Italy's demand either by virtue of the treaty as a contract or by virtue of the treaty as a municipal law, and the Honorable Secretary, representing the sovereignty as its *alter ego*, is likewise not bound. The facts result in creating an imperfect obligation under international law only and an arbitrary discretion in the sovereignty and in the executive head which, by reason of our constitutional limitations, cannot be exercised by the executive as against the constitutional rights of a citizen.

Again, a broad distinction must be drawn between those cases of alleged breaches of treaties where the alleged infraction or breach of the treaty is in dispute, leaving it still a question for the political power and not for the judicial power

of the government to decide. Such an instance would be a treaty of peace where the question whether certain cities had been evacuated in pursuance of the time limits of the treaty or alleged breaches of this description would be in dispute between the two governments.

To allow, on such an issue, evidence in court between private parties to establish rights one way or the other, dependent upon the establishment of the facts, would put the departments of government in absurd conflict; and no true analogy exists between the facts of such a case of a breach of such treaties and the facts of a case of a breach of an extradition treaty of this class.

Again, a treaty of peace of this character stands by itself as compared with a treaty of extradition, in that an admitted default under such a treaty could not give individual rights to individual citizens, but only to the government at large, with the mighty issues of war and peace dependent thereon—matters peculiarly within the province of the political department.

*The Legal and Diplomatic Constructions Agree as to the Breach  
—No Conflict Between Them.*

But the facts are entirely different and distinctive in the case in hand. Here the treaty involved is an extradition treaty. The issue as to its breach is, under the circumstances, neither an issue of law nor of fact—for the very American diplomatic construction which establishes the construction of the word "persons" in the treaty to include citizens of the asylum country, at the same time establishes, on the facts admitted by both Italy and America, Italy's breach thereof.

And the very Italian diplomatic construction which claims that the construction of the word "persons" in the treaty excepts citizens of the asylum country, at the same time establishes on the admitted facts, admitted by both Italy and America, Italy's breaches.

So, the case in hand presents to this court facts of the very narrowest kind—facts of a case so simple and so unique on their face that the decision cannot establish a rule as to treaties that could extend beyond extradition treaties as such.

As is said by this court in *Liverpool, N. Y. & Ph. S. S. Co. vs. Commissioners of Emigration*, 113 U. S., 33 (28 L. ed., 899):

"It (the Supreme Court) has no jurisdiction to pronounce any statute, either of the state or of the United States, void because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction it is bound by two rules to which it has rigidly adhered; one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safeguards to sound judgment. It is the dictate of wisdom to follow them closely and carefully."

113 U. S., 33; 28 L. ed., 901.

In one aspect, the facts of the case in hand present a case in strict analogy with the facts in the *Rauscher* case. The dispute between the two governments as to the meaning of the word "persons" in the treaty, when the citizen's right is involved, is a dispute which this court is called upon to adjudicate without reference to the diplomatic construction indulged in by this country. So far as concerns that point, at least, the scarecrow of diplomatic construction cannot affect the deliberations of this court on the matter.

So, likewise, the *Rauscher* case is a clear authority for the proposition that on the facts of this distinction between classes of treaties—namely, the facts as to the distinction between the persons who act and the act to be done and the authority vested in the persons who act as to the act to be done—no fetich of diplomatic construction stands in the way of examination of the law on the facts to be ascertained and declared by this court.

Conceding the American construction to be true, for the purposes of the argument, we then find the diplomatic and legal construction agree on the admitted facts of the case in thereupon finding as a fact the breach by Italy of the treaty, namely, repeated breaches by her executive through her Foreign Office and breaches by her legislature in passing sub-



sequent to the treaty an act forbidding the extradition of Italian subjects.

From this we unerringly infer, both by diplomatic and the legal construction, an extradition treaty admittedly broken by Italy, and hence not internationally binding on the American sovereignty, hence an imperfect obligation leading to an arbitrary discretion in the sovereignty to deport or not to deport.

What, then, is the right of the American citizen, if, in spite of this imperfect obligation or lack of obligation on the part of the American sovereignty to respond to the Italian demand, the executive acts for the purpose of deporting a citizen?

The answer lies in the character of the act proposed, the distribution of the powers of departments of government under our system of government, and in the constitutional limitations affecting them.

Conceding the breach, the opinions below place the right to extradite this man on the claim that, although the treaty has been broken, Congress has not abrogated it.

From the fact that Congress has not acted on the breach is inferred the continued binding force of the treaty as a municipal law on the officers of government until the legislative body shall have abrogated it.

*It is respectfully submitted that, as applied to an extradition treaty, this claim is unsound.*

*In the first place*, in one of its meanings the proposition begs the question of the binding force of the treaty as a municipal law, by assuming that the prior action of the executive department in claiming the American construction of Italy's breach has amounted to nothing—has been ineffectual to accomplish any result—in other words, denies that the executive action heretofore had by America in denouncing the Italian construction and affirming the Italian breach—admitted by Italy—has had any international or municipal effect upon the treaty.

In so denying, the argument is opposed both by the precedents and by reason—by the precedents in that, it has always been law that the executive is the organ of communication with foreign nations and has full power to commit the

nation in all matters of this kind. Ever since the decision of this court in the

*Prize cases* (2 Black 635-699; 67 U. S., 635; 17 Law ed., 459), the executive has been held to have the widest powers in this respect, limited only by the provisions of the constitution.

Research of counsel has developed only one similar case as a precedent under an extradition treaty—the *Winslow case*.

*The Precedent of the Winslow Case.*

"In 1876 a controversy arose between the United States and Great Britain in the case of one Winslow, whose extradition was demanded from the British Government on the charge of forgery, as to whether a fugitive from justice, delivered up under Article X. of the treaty of 1842, might be tried for an offense other than that for which he was surrendered. In consequence of this controversy the operation of the treaty was suspended for six months. The execution of the treaty was then resumed without any express agreement as to the point of dispute which had occasioned its suspension."

For. Rel. 1876, 204-309; For. Rel. 1877, 271, 289, 5 Moore Int. Law, p. 321.

"In the discussion of the foregoing case, Mr. Fish said that, if her Majesty's government should conclude that the British Parliament had by the Act of 1870 attached a new condition to the performance by that Government of its engagements, the President did not see how he could avoid regarding the refusal by Great Britain to adhere to the provisions of the article as an 'infraction and termination' of it.

Mr. Fish, Sec. of State, to Mr. Hoffman, Charge No. 864, March 31, 1876, For. Rel. 1876, 210, 218.

The British Government denied that it had imposed a new condition upon the execution of the treaty. Lord Derby to Mr. Hoffman, May 4, 1876, For. Rel. 1876, 227-230.

In his message to Congress of June 20, 1876, Presi-

dent Grant, varying the form, but not the substance, of Mr. Fish's statement, said that the position taken by the British Government, if adhered to, could not 'but be regarded as the abrogation and annulment of the article of the treaty on extradition' (For Rel. 1876, 254)."

5 Moore Int. Law, pp. 321, 322.

The same question was afterwards passed upon by this court in *United States vs. Rauscher*, 119 U. S., 407, which upheld the British construction of the treaty as against the diplomatic construction of our own State Department.

The foregoing precedent establishes the proposition that, under the practice of this government, on the breach of the treaty the executive has full power to suspend its operation, although Congress has not acted, the point being that the executive represents the nation, and as such has the complete power to affirm or disaffirm a broken treaty, except in so far as constitutional limitations prevent action on the part of the executive as compared with action on the part of the legislature.

Thus, in the *Winslow* case, the United States Department of State, without any authority from Congress, ceased to obey the treaty on demands from England, and for six months the operation of the treaty was suspended.

In so acting, were Mr. Fish and General Grant obeying this extradition treaty as a law of the land pursuant to their oath to sustain the constitution, or were they violating the constitution in thus interposing executive action contra to the terms of the treaty?

It is respectfully submitted that, by reason of the nature of an extradition treaty, both Mr. Fish, as Secretary of State, and President Grant were acting strictly within their rights as the executive head of the government, for it is to be noted that the right in the executive to disaffirm the treaty by refusing to be bound by its obligation when it has been broken internationally is a right which interferes with no constitutional limitation or liberty of the citizen, and hence is unrestricted.

A different question arises when the executive, on the international breach and the option in the sovereignty thence

arising to affirm or disaffirm the treaty, attempts to act under it as though the sovereignty were still bound.

For, in so doing, he elects to exercise an arbitrary option, which, as exercised by an executive officer, thereby making the deportation a question of arbitrary discretion in an executive officer and not a law of the land, comes in conflict with the provisions of the constitution protecting the liberty of the citizen.

*So far as concerns the sovereignty itself, or the executive head acting in its capacity as the alter ego of the sovereignty, the dissolution of the obligation of an extradition treaty arising from the admitted breach dissolves the obligation so far as concerns the sovereignty itself equally whether the treaty be viewed as a contract or as a law of the land.*

In fact, the action of Mr. Fish, as Secretary of State, in refusing to allow any further operation to the treaty, in view of England's breach of the construction of the same as construed by our diplomats, was based on the common-sense principle that, while a treaty is both a contract and a law, a treaty of extradition containing a simple covenant to do a simple act personally between the heads of the respective sovereignties, is of so simple a character that a breach of the covenant to deport the person on demand, on the request of one government—if done under wrong construction or otherwise—is a breach of the contract which dissolves the obligation both of the treaty as a contract and of the treaty as a municipal law, *so far as it may be said to be binding on the head of the nation, the executive department, the alter ego of the sovereignty.*

In fact, to find any distinction in such a case—in an extradition treaty so broken—between the obligation of the extradition treaty as a contract and the obligation of the sovereignty or the head of the sovereignty to act under it as a municipal law savors of the delicate subtleties of the schoolmen.

For, on the facts, how does the Honorable Secretary Knox act in this case when, pursuant to Italy's demand, he deports the defendant? Under the argument below, he is acting as a citizen of America in obeying the broken treaty—a yet unbroken municipal law—and, as a law-abiding citizen, is

deporting the defendant in order to comply with a municipal law binding on all good citizens.

This expansion of the claim to its full meaning proves its untenability in fact and in law.

The Honorable Secretary is not, in his capacity as an American citizen, obeying an existing law on the statute books compelling him to deport this defendant, but he, in his capacity as the *alter ego* of the President—the executive head of the nation—and as the sole representative in such matters of the sovereignty—a sovereignty engaged in obeying an act not under municipal law, but an act under and by virtue of its foreign relations, is deporting an American citizen to Italy—doing an international act—under a claim of being obliged to do so, when the sovereignty itself, for whom he is acting and of which he is the *alter ego*, on the admitted facts is not obliged to so act. The point is that the Honorable Secretary, in deporting the defendant pursuant to the demand under this treaty, is not acting as a citizen or as an underling of the government having no powers in the premises and therefore bound to obey the treaty as a municipal law until otherwise directed, either by the executive head or by Congress, but he is the very sovereignty itself, the *alter ego* of the sovereignty performing an international act not binding on the sovereignty, and performing it not in his capacity as a citizen but as the head of the nation, the sovereignty itself. It follows, the sovereignty not being bound, that he has the full powers of the sovereignty in the premises, of affirmance or disaffirmance; in other words, an absolute discretion except where limited by constitutional limitations. It follows that he, as the sovereignty, in so acting, is not compelled to act in affirmance of the treaty as a municipal law until such time as Congress shall denounce it. Hence in him rests an arbitrary discretion. Hence he can not exercise this discretion against the Constitutional rights of the citizen.

On the contrary, he, as the sovereignty and the *alter ego* of the sovereignty, has full power by reason of the admitted breach to disaffirm the treaty and refuse to deliver the man. This existence of this absolute discretionary power of affirmance or disaffirmance in the executive, except as limited by constitutional limitations, is the distinguishing fact in the case in hand under this extradition treaty. A denial of the full and

ample power of the executive to affirm or disaffirm the treaty on these facts, except in so far as constitutional limitations affect the power of the executive, is against the precedents and the principles of constitutional law as shown.

It is likewise against reason, in that, although a treaty is a municipal law as well as an international contract, it cannot when broken be any more binding on the nation or the executive head of the nation having this discretion, as a law, than it can be as a contract. Note the distinction. This is not a case of facts involving the duty of an ordinary citizen or underling of the government having no powers or connection with the sovereignty giving him discretion in the premises for the government to act or not to act in the case of broken treaty obligations.

The act called for to be done is not a private act between private individuals having no discretion or power in the premises, but is an act of the sovereignty itself as represented by its executive head, its *alter ego*, and hence is as free to be done or not to be done, either as a law or as a contract, as the sovereignty itself is free.

*On the Facts of the Case the Executive has an Arbitrary Discretion Arising from the Imperfect Obligation on the Sovereignty.*

All of which brings us around to what should have been a self-evident proposition, namely :

That, on the facts of this case, in determining whether to deport or not to deport an American citizen, the Honorable Secretary of State is under no legal obligation under the treaty, whether considered as a municipal law or an international contract, so to do, and hence has an absolute discretion to deport or not to deport—similar to the absolute discretion existing in the sovereignty and executive head to extradite or not to extradite when the obligation is sought to be exercised on demand under the comity of the international obligation of curtesy under international law.

Having thus established the fact of an absolute discretion in the executive under the facts of this case, not to extradite or to extradite, except as limited by constitutional provisions ; the next question is to determine whether, under our system

of government and our constitutional limitations, this absolute discretion can be exercised by the executive officer in favor of deportation and against the rights of the citizen as protected by constitutional limitations.

*Replies to Objections to Argument.*

But, to reply to some possible answers to the foregoing argument :

FIRST, it may be argued that the above argument assumes that the executive department of the government has, in the correspondence heretofore had, not only construed the treaty differently from Italy, but, by reason of Italy's breach, has denounced a nullification of the treaty. Now, examine those letters and you will find that, although the Secretary says :

"In view of what has been shown, I am unable to discover any ground of reconciliation of the totally opposite views entertained by the United States and Italy in regard to the force and effect of the treaty of 1868, unless the government of Italy will reconsider its position. The present situation, therefore, seems to me to require either the denunciation of that treaty or the inclusion of new stipulations upon which the contracting parties will find themselves in agreement."

*Record*, p. 129.

*U. S. Foreign Relations of 1890*, p. 566.

Yet, this does not amount to a denunciation by the executive. Hence the treaty has not been denounced or nullified either by the American executive or by the American Congress, however much of a breach there may be. Hence, your argument falls to the ground.

*The reply is :*

The argument above advanced does not depend upon either the executive or legislative branch of the government having abrogated or nullified the treaty or declared the treaty void. Such a declaration would be an action on the part of the sovereignty to disaffirm the treaty binding on everyone, Secretary of State, marshal and citizen alike, and would, had it happened, end all question in this case, because then the treaty would have been ended for all purposes.



But what the above argument is founded on is the proposition that when a treaty, as a treaty or contract, is broken, the innocent party has the right to a period of election in which such party may elect to affirm or disaffirm the broken pact. During such time the sovereignty having such election is not legally bound to obey the covenants in the treaty, but has an absolute discretion to affirm or disaffirm the same. This absolute discretion rests, under the circumstances of this case under this extradition treaty, in the American sovereignty today, and, except as modified by constitutional limitations, in the executive head of the nation, the Honorable Secretary as representative or *alter ego* of the sovereignty.

SECOND, it may be further argued that, since the executive by its prior action has never actually disaffirmed the extradition treaty with Italy for the alleged breach, the present executive has full power to reverse the former executive's action and, thereupon, create a new ruling to the effect that an American citizen can be deported under the facts of this case.

But, in what way would he reverse the action of the former executive? If he elects to claim that the former executive was wrong in claiming that the word "persons" included citizens of the asylum country, then, on the face of such reversal, he has placed himself out of court in this case. If he elects to affirm the former executive's ruling that "persons" includes citizens of an asylum country, and still attempts to comply with Italy's demand, he is, in the face of the breach of the treaty, exercising an absolute discretion. Thus, in this view of the case, it makes no difference whatsoever what the construction of the treaty by the present executive is. If he disagrees with his predecessors and thinks the Italian construction right, then, of course, he cannot extradite because the treaty does not cover the case. If, on the contrary, as is the fact in this case, he affirms the construction of his predecessors to be right and affirms the Italian breach and then attempts to deport the citizen, he would still, by reason of the breaches already made of the treaty by Italy, *and without more*, be in the same position of being under an imperfect obligation and of having an absolute discretion in the premises and of exercising a power of deportation when no legal duty rested upon the sovereignty so to do, or rested upon him as the *alter ego* of the sovereignty to comply with Italy's demand.

*For the date of the breach is utterly unimportant, whether before or after the construction of the treaty so made by the executive. For out of the breach arises the imperfect obligation and out of the imperfect obligation arises the arbitrary discretion, and out of the arbitrary discretion arises the constitutional limitation protecting the citizen from its exercise by the executive.*

It is respectfully submitted that from the foregoing we have proved that there exists, under the circumstances of this case, in the Honorable Secretary of State, the representative of the sovereignty, the *alter ego* of the sovereignty, the same right as exists in the sovereignty itself, namely, an arbitrary discretion by reason of the breach to affirm or disaffirm this treaty by deporting this American citizen on Italy's demand, except in so far as constitutional limitations affect executive action.

What is the absolute discretion existing in the sovereignty and the Secretary? It is an absolute discretion on the part of the sovereignty and the Secretary to affirm this broken contract and treaty by deporting this man, or to disaffirm it by refusing the demand. Note that the disaffirmance by refusing to comply with the demand would not, under the circumstances, be itself an abrogation or repudiation of the treaty. The principle is clear that where one party is in default under a contract with independent and successive covenants, it is the right of the other to simply refuse to act, still leaving open the question of rescission or affirmance until a later date.

This government being a government of distributed and limited powers among the various departments, executive, legislative and judicial, in whom rests this absolute discretion?

As to certain other acts of affirmance or disaffirmance of this extradition treaty, we can answer at once, for the answer under the constitution is clear. Thus, Italy having broken her entire and reciprocal covenant in this treaty, the United States has the option:

First, to rescind the treaty for breach.

Second, to insist upon Italy's compliance with the treaty:

- (a) By going to war about it; or
- (b) By proposing an arbitration convention in regard to it; or
- (c) By acquiescing in the Italian construction.

It follows that it is not a question of whether "an extradition treaty must be wholly reciprocal", but a question of whether an extradition treaty, being expressed in the form of a reciprocal covenant and being broken by the foreign government, the executive, as a part of the sovereignty, consisting of the legislative, judicial and executive branches, can exercise the option arising under both municipal and international law to

1. Declare the treaty rescinded ;
2. Declare it operative and proceed to affirm it by—
  - A. War ; or
  - B. Arbitration.
3. Affirm it and proceed to deport a citizen on demand.

The statement of the proposition indicates the answer.

When a breach of this kind had occurred, it does not rest with the executive to exercise any option in regard to the matter, which, under our constitution, is vested only in the legislative powers.

Thus the executive cannot exercise the option of affirming the treaty by either war or arbitration, because, under Article 1, Section 8, of the United States Constitution, to congress is exclusively granted the power to "provide for the common defense and general welfare of the United States", and "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

The Executive Department can not enter into a treaty of arbitration with reference to the construction of the treaty because Sec. 1 of Art. II. of the United States Constitution provides that the president "shall have power, by and with the advice and consent of the Senate, to make treaties provided two-thirds of the Senators present concur."

It follows that the option thus resting in the sovereignty, under the doctrines of municipal and international law, to affirm the treaty or consider it abrogated on account of the breach made by the other side, are options which, under our constitution, are not vested in an executive officer, but only in congress or the treaty-making power because of the existence of the constitutional limitations.

A treaty thus broken by the other party is thus no longer a law of the land, for the reason that it is no longer an obligatory

law but an optional law, and just as, in defiance of Art. I., Sec. 8, and in defiance of Art. II., Sec. 2, the executive has not the power to enforce the treaty, either by war or arbitration convention, so the executive has not the power, in view of the constitutional limitation requiring "due process of law" before the liberty of a citizen can be affected, to enforce the treaty by deporting a citizen under this law—a law which is no longer obligatory upon the nation but only optional by reason of facts occurring after the enactment of the law and not provided for in the law itself.

For the rule is well settled that, in order for the executive to have the power to extradite, there must be—

1st. A treaty; or

2nd. An act of Congress.

And what is meant by the rule is either that there must be a treaty obligation or an obligation under the act of congress, or there must be an act of congress or treaty expressly providing for the exercise of discretion by the executive officer.

But, except as so limited by the provisions of the constitution the powers of the executive on such a breach are ample :

(a) To affirm the treaty ; or

(b) To disaffirm it as representing the sovereignty.

Thus, the executive can go to the expense of sending special envoys to treat with the foreign government with reference to the matter, or to negotiate a proposed treaty of arbitration or other new treaty.

So, the executive has full powers of disaffirmance. It can refuse to recognize Italy's demands as to similar persons or other persons, because no constitutional rights of any one are involved.

So we claim in this case that the executive head of the nation, under the facts of this case, cannot affirm this Italian treaty in view of its admitted breach, by deporting an American citizen, because in so doing he exercises an arbitrary discretion resting in him to extradite or not to extradite under the circumstances, and this is contrary to the constitutional provision protecting a citizen from the exercise by executive officers of such arbitrary discretion and allowing his life, liberty and property to be only affected by the law of the land.

We support this claim by a further brief addressed solely to this question, annexed hereto and marked "Appendix."

It is to be noted in this connection that, even should the present proceeding fail by reason of this constitutional limitation, full power still exists in Congress, which, in matters of this description, has been held to have the power of passing an *ex post facto* act or treaty applying to offenses committed before the passage of the act or treaty.

12 Am. & Eng. Ency. of Law (2nd Ed.), 1294.

*In Re De Giacomo* (1874), 12 Blatchford, 391.

*In Re Stupp* (1875), 12 Blatchford, 501.

*The Foregoing Reasoning Does not Apply to the Case Where Congress has Expressly Granted Discretionary Power to the Executive.*

And here, to prevent a misunderstanding of the effect of the foregoing argument :

The foregoing reasoning does not apply in any sense to affect the validity of treaties made by the Congress when Congress has, by the express terms of the treaty, delegated this arbitrary discretion to extradite or not to extradite to the executive head under the facts arising under the treaty. This court has repeatedly upheld express delegations of the discretion vested in Congress in analogous matters ; and nothing contained in this argument runs contra to the reasonings on which those decisions were made. But this is not a case where Congress has so delegated any powers to the executive.

Assuming that the result of this argument is to determine that the Italian treaty, under the conditions, does not apply to citizens of the asylum country, this result is not so contrary to the existing practice in our extradition treaties with foreign countries as has been claimed. As shown in this brief it will add only one treaty to the thirty-one others whose express words would, under facts of this nature, prohibit the extradition of the prisoner.

### POINT III.

ON A HEARING BEFORE A MAGISTRATE IN EXTRADITION PROCEEDINGS UNDER THIS TREATY, PROOF ON BEHALF OF THE ACCUSED OF INSANITY AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE AND INSANITY AT THE TIME OF THE HEARING IS COMPETENT AND THE MAGISTRATE'S REJECTION OF THE SAME IS ERROR.

The question is brought up and the facts of the excluded evidence fully stated under the Seventh assignment of error (*Record*, p. 186) and the further Twentieth and Twenty-first assignments of error (*Record*, pp. 195 and 196).

In proof of the foregoing we submit the following argument:

#### The Insanity Issue.

##### I.

*Evidence for the defense is competent.*

1 Moore on Extradition, Sec. 346, p. 526.

Wharton's Crim. Pleading & Practice, Sec. 70  
*et seq.*

Bishop's Criminal Procedure, Sec. 233 *et seq.*

##### A.

Before the Act of 1882 the cases had been conflicting.

*Ex parte* Ross, 2 Bond, 252, D. C. S. D. Ohio,  
April, 1869; 20 Fed. Cases, No. 12069, p. 1228,

had held that introduction of evidence in defense negating the charge of criminality was permissible.

A similar ruling had been made in—

*In re* Parez, 7 Blatchf., 345; 8 Fed. Cases No.  
4645, p. 1007.

A contrary decision had been made in—

*In re* Dugan, 2 Lowell, 367; D. C. Dist. of Mass.,  
1874; 7 Fed. Cases, No. 4120, p. 1174.

In this last case, however, the judge had said :

“As my powers are derived from the United States, and my action is governed by acts of congress, so far as they apply, I do not feel at liberty to adopt any other rule than that which governs the courts and magistrates of the United States. I should be glad to receive that evidence, which one branch of congress has, twice at least, expressed itself in favor of admitting, but can not find it in my power to admit it.”

The congressional action in question is probably the preliminary skirmishes in congress which finally resulted in the passage of the act of August 3, 1882.

## II.

### *The act of Congress of August 3, 1882.*

Under the circumstances it would seem that the whole question ought to have been settled by the act of congress of August 3, 1882, which provides as follows :

“SECT. 3. That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth *that there are witnesses whose evidence is material to his defense, that he can not safely go to trial without them,*<sup>1</sup> what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed ; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.”

See, 1 Moore on Extradition, Sec. 346, p. 526.

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<sup>1</sup> The italics are ours.



The language of this act is clear.

It speaks of a "defense" to the extradition proceedings.

It speaks of a "trial" of the extradition proceedings.

The use of the word "may" as to the judge granting the subpoenas seems to be only for the purpose of preventing useless expense to the United States in case the defense is frivolous. In any event, the "may" is a judicial "may" and not an absolute discretion.

In effect it means "must" under the decisions wherever substantial rights of a party are involved.

See the construction of the word "may" in numerous statutes, including statutes allowing costs under certain conditions, where it is held that the conditions mentioned in the statute existing, there is no discretion to refuse the costs, etc., etc.

It follows that the statute provides for a defense and it provides for a trial, and it then provides that the United States Government will pay the expenses of the witnesses if the petitioner cannot do so.

It is, therefore, a clear legislative expression of intention that in extradition cases a "defense" is allowable and a "trial" is allowable. And since it was passed at a time when the courts, in at least one instance, had rejected any defense to extradition cases, it must be presumed that a change in the law was intended.

It follows that this statute is a clear legislative expression of the intent that a defense to an extradition was proper, and that a trial of the issues raised by the extradition is intended.

And this is the effect of the ruling in

Oteiza vs. Jacobus, 136 U. S., 330, 34 L. Ed., 464, 467.

for the court there held that the act of 1882 meant the right of the accused to present before the commissioner the oral testimony of witnesses *and not the right to obtain testimony by deposition of witnesses living elsewhere* to present before the commissioner, and to that extent approved the decision to that effect in :

*In re Wadge*, 15 Fed., 864, 866.

So far, however, as the last mentioned decision in a dictum implied that the trial mentioned in the act of congress was

only such a hearing as was known to the common law on commitments for future trial, this Court has not expressly approved the same, the ruling below having been cited and approved only to the following extent.

" Judge Brown considered the Act of August 3, 1882, and held *that while it was the duty of the commissioner, under Sec. 3 of that act, to take such evidence of oral witnesses as should be offered by the accused, the statute did not apply to testimony obtained upon commission or by deposition,*<sup>1</sup> adding that, so far as he was aware, there was no warrant, according to the law or the practice before committing magistrates in the State of New York, for receiving testimony by commission or by the depositions of foreign witnesses taken abroad, and that all the provisions of the law and the statutes contemplated the production of the defendant's witnesses in person before the magistrate for examination by him."

Oteiza vs. Jacobus, 136 U. S., 330 ; 34 L. Ed., 467, 468.

### III.

*Decision after the passage of the act, Judge Nelson held in—*

*In re Kelley*, 25 Fed. Rep., 268 (D. C. D., Minnesota, 1885),

that the exclusion of witnesses for the defense before the commissioner was error requiring the reversal on *habeas corpus* of the proceedings.

While he based this ruling on Sec. 13, p. 934, Young's Statutes of Minnesota, the substance of that statute is substantially the same as the United States Statute on the subject.

Thus, the Minnesota statute enacted that—

" After the testimony to support the prosecution is finished, the witnesses for the prisoner, if he has any, shall be sworn and examined."

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<sup>1</sup> Italics are ours.

The United States statute, on the other hand, is even broader, giving full authority to examine witnesses for the prisoner as on a "trial" and in his "defense" under the extradition proceedings.

None of the authorities as to proceedings before the committing magistrate touch the question of the admissibility of insanity as evidence for the defense.

It is respectfully submitted that insanity is an issue in these proceedings of such peculiar nature that, even if the general principle were that defenses could not be introduced for the prisoner, the issue of insanity would stand upon an entirely different principle and still be admissible.

#### IV.

*The precedents in the proceedings in the State Department are to the effect that the defense of insanity is a bar to the application for extradition.*

Case of R., 4 Moore's Dig. Int. Law, P. 221 ;

The Catlow case, fully set forth in 1 Moore on Extradition, Sec. 346, p. 528.

" On September 23, 1879 (MSS. Notes, Br. Leg.), the British minister complained that one Catlow, charged with murder on a British vessel on the high seas, had been discharged by a commissioner in New York on the ground of his insanity. Upon the hearing it was admitted that Catlow had committed the homicide in question ; and the minister suggested that the commissioner, in admitting evidence of insanity, had exceeded his functions, the question of insanity being a matter of exculpation proper to be considered only by the jury on the trial. The re-arrest of Catlow, with a view to his extradition, was requested. The Secretary of State having referred the minister's note to the Department of Justice, the Solicitor General, with the approval of the Attorney General, advised that as the evidence as to insanity ' did not tend to contradict or impugn the testimony introduced as to the fact of homicide, but only to explain it, so as to show that the consequence otherwise deducible did not in fact follow ',

such evidence was properly admitted (16 Op., 642, Phillips, Sol. Gen., 1879). The Secretary of State accordingly declined to take any steps looking to the rearrest of the fugitive (Mr. Evarts, Sec. of State, to Br. Min., Feb. 4, 1880; MSS. Notes Gr. Br.)."

1 Moore on Extradition, § 346, p. 528.

## V.

*Insanity issue an attack on a legal presumption rather than a strict defense.*

It is not so much a defense as it is an attack on the prosecution's case as to a point on which the prosecution has the burden of proof, and should not be permitted to rest merely on a disputable presumption, namely, that of sanity.

### *The Argument on Principle.*

The clear intent of the congressional legislation was to open the door in extradition proceedings to a defense and a trial.

Even if it should be held that certain defenses were not admissible, as, for instance, self-defense, it is unquestionably clear that certain defenses are by implication permitted.

It is clear you may prove that the alleged murder was not a murder but assault with intent to murder.

It is clear you may prove that the crime alleged is not a crime under the treaty.

It is clear you may prove that the crime alleged is a different crime from the one on which the extradition is asked.

Insanity at the time of the hearing is always a matter for the court to take into account.

Insane persons are, in the nature of things, wards of the court, and, where the charge is felony, if they have no sane mind, they are practically not present so as to be able to advise counsel, and hence cannot be tried.

In most jurisdictions, special provision for the examination and determination of this question is now made by statute.

22 Cyc., 1215.

The offer which was excluded before the magistrate was not only to prove that the prisoner was insane at the time he committed the alleged crime, but also that he was insane at the time of the proceedings before the magistrate.

(Testimony, page 39.)

Hence here is a clear case of legal error requiring this court to now take proper proceedings to determine his sanity at the time of the trial and at the present time before extraditing him.

On general principles this appears perfectly clear :

See 12 Cyc., p. 509,

and I understand the New Jersey law allows a trial of the issue of insanity before the main trial.

If, during the progress of the trial, either by observation or on the suggestion of counsel, facts are brought to the attention of the court indicating the present insanity of the defendant, the question should be determined before another step is taken in the trial.

12 Cyc., 510.

State vs. Peacock, 50 N. J. Law, 34, 36 ; 11 Atl., 270.

There was thus legal error in the magistrate in overruling this portion of the offer.

So, likewise, insanity at the time of the crime is proper to be proved in defense of extradition under the reasonings and authorities above cited, because it shows that no crime was committed under the treaty and attacks the jurisdiction of the commissioner.

Under the rulings of the Supreme Court in

Davis vs. U. S., 160 U. S., 469, 487,

and the rulings of the State of New York in

Brotherton vs. People, 75 N. Y., 159,

and the State of New Jersey—

the issue of sanity in criminal cases is one on which the prosecution always has the the burden of proof.

It is not an affirmative defense to be proved by the defendant alleging it by a preponderance of evidence, but it is a defense on which, when any evidence is presented to the court, the disputable presumption of sanity theretofore supporting the prosecution is at once impugned and the burden remains

with the prosecution to prove beyond a reasonable doubt to the satisfaction of the court that the crime has been committed and has been committed by a sane mind.

By reason of this peculiar nature of the insanity plea, it is not technically a defense but more in the nature of an attack upon a disputable presumption of sanity on which the prosecution is entitled in the first instance to rest.

Sanity remains always a part of the people's case. The burden of proof never shifts. The people may begin with the legal presumption of sanity. The moment, however, any evidence goes to show insanity, the burden is not on the defendant to prove it as an affirmative defense, but on the state to show sanity beyond a reasonable doubt as against all the evidence introduced.

Davis vs. U. S., 160 U. S., 469, 487; 40 L. Ed., 499, 505.

It is not, then, a defense strictly so called. It is in the nature of a disproof of an essential element of the prosecution's case.

All this shows how essential it is in the interests of justice that insanity issue should be tried out in extradition. For it is collateral to the main issue and not a mere denial or justification of it.

It admits the facts and says on the existence of other facts collateral thereto, such as family history and surrounding circumstances, there was no sane mind to commit the crime.

On what ground should the state be allowed to rest in extradition proceedings on the mere presumption of sanity, and by barring evidence contra change a disputable presumption to a conclusive one resulting in the deportation of a citizen.

Such ruling may be fair enough where the bar leads only to a trial on the merits before a court in his home country and among his people. But it is carrying the legal presumption too far, as supporting the people's case, when you propose to take a man out of his own country, far from home and friends, on the mere presumption that he is sane when witnesses are present and stand ready to show the contra of the presumption as a matter of fact.

A mere disputable presumption should not, by legal technicality, be made a conclusive one so as to banish an insane

citizen to a foreign country, there to take care of himself as best he may. Such is not the object or the policy of the extradition acts.

For the reasons stated, the petitioner should have been allowed to introduce evidence :

A. to the effect that the prisoner was insane at the time of the hearing before the magistrate ; and

B. to the effect that the prisoner was insane at the time of the commission of the crime.

Either or both are and should be a complete bar to extradition, and steps should now be taken for the purpose of ascertaining these facts before any extradition should issue.

It will be noted that the Secretary of State himself has not passed upon this question in his opinion, but has left it to the decision of the courts.

### **Reply to the Opposing Argument.**

In answer to the foregoing it is argued as follows :

In case of

Benson vs. McMahon, 127 U. S., 457 ; 32 L. Ed., 234, 236,

cited and approved in

Oteiza vs. Jacobus, 136 U. S., 330 ; 34 L. Ed., 464 ;

this court has likened the proceeding before the commissioner not to a final trial, " but rather of the character of those preliminary examinations, which take place every day in this country, before an examining or committing magistrate, for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding in which he shall be finally tried upon the charge made against him." From this observation is claimed to be derived an alleged rule that only defenses permissible before an examining magistrate in the state where the extradition proceedings are taken are permissible in extradition proceedings.

It is respectfully submitted that the court in ruling as above did not then and there have before it facts involving the question of the admissibility of evidence of insanity at the time of the crime and at time of the hearing in extradition proceed-



ings. The language in question therefore was not used in reference to such facts. Again the rule as stated is a mere rule of analogy, useful to a certain extent ; but not to be blindly followed where either reason or public policy requires a different result on different facts ; such as the different facts in this case of the insanity issue or facts involving whether the crime is one covered by the treaty—embezzlement as distinguished from larceny for instance.

In the states of New York and New Jersey, insanity at the time of the hearing is competent and is ground for adjournment.

Insanity at the time of the crime is left to be tried out in the main trial.

But the better rule of procedure now advanced by the best thinkers at the bar and in public life, having in view the Thaw case and other notorious occasions, and probably soon to be established in statutory rule is that in murder cases of this description, where insanity is pleaded, the question of insanity shall be submitted before the trial on the merits to the judge acting by and with the advice of competent experts.

The solid and good grounds for such a change in our municipal law are apparent.

In extradition proceedings this question is for the first time presented to this Court. If has been decided in favor of the prisoner, as shown above, in a few decisions under the former diplomatic policy of the State Department.

It is respectfully submitted that every reason of justice requires that in extradition proceedings the issue of insanity at the time of the crime and at the time of the hearing should be tried out before the committing magistrate. It would be a great injustice to deport a prisoner, insane as claimed, to a distance from his home and friends, to be there tried under different rules of law as to insanity and the evidence of culpability or mental responsibility than would be applicable in the place of his nativity where he is found.

The analogy of extradition proceedings with common law proceedings preliminary to trial on the merits within the jurisdiction is only an analogy *not a likeness* and should not be pushed beyond what is fair and just under the circumstances.

It was error therefore to reject the evidence below.

#### POINT IV.

**Under Article V. of the Treaty of 1868, as amended in 1885, it is obligatory upon the Italian Government, in prosecuting proceedings thereunder, to prove not only the original requisition for a mandate for the arrest, but also the formal demand within forty days after the arrest and the other documents mentioned in the treaty, namely, duly authenticated copies of the sentence in case of conviction or duly authenticated copies of the warrant of arrest and of the deposition on which the warrant of arrest was granted in case of accusation before conviction.**

##### A.

THE PROPER CONSTRUCTION OF THE TREATY AND ACT OF CONGRESS.

It is only necessary to refer to the terms of the treaty itself in proof of this statement. The treaty reads :

“ And the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall “ be made and supported by evidence as above provided ” this means a duly authenticated copy of the sentence of the court in case of conviction or a duly authenticated copy of the warrant of arrest in the country where the crime was committed, or of the depositions upon which such warrant may have been issued.”

The treaty, as it originally stood, required certain authenticated copies to be sent on to this country before the mandate of the Secretary of State could be delivered for the arrest of the fugitive (See *Record*, p. 11). These formal prerequisites having been found to be inconvenient, the amendment of 1885 was passed allowing an arrest and the formal prerequisites

of requisition for the arrest duly authenticated and a duly authenticated copy of the sentence or of the warrant or of depositions upon which such warrant may have been issued to be thereafter presented, together with the additional requirement of a formal demand for his or her extradition (these are all called for by the addition to Article V. made by the amended treaty of 1885 (see *Record*, p. 13). The treaty then goes on to provide :

" If, however, the requisition (meaning the original requisition for the mandate), together with the documents above provided for (meaning the duly authenticated copies of the sentence or of the warrant or of the depositions upon which the warrant was granted), shall not be made as required by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days of the date of the arrest of the accused, the prisoner shall be set at liberty."

The mandate of the treaty should, therefore, be obeyed in case of no formal demand within forty days, on the authority of the following cases :

It will be noted that in the proof and record before the magistrate no attempt was made by the prosecution to prove on its behalf compliance with the treaty requirements.

The treaty since the amendment of Article 5 in 1884 clearly requires a formal demand to be thereafter made for the extradition of the accused within forty days after the arrest whether the preliminary request be made with or without accompanying evidence of criminality.

Hence we claim the proceedings must fail.

In

Tucker vs. Alexandroff, 183 U. S., 424, 46 L. Ed., 264,

Sec. 5280 of the Revised Statutes required proof of the ship's roll of a similar document to be presented before the Commissioner in connection with the prosecution thereunder. Both the prevailing and dissenting opinions treat this requirement as absolutely a condition precedent to the validity of the prosecution.

Again under the provisions of the Revised Statutes as to Inter State Extradition requiring a Governor of a state to honor a requisition when accompanied by an affidavit, this Court held that the Governor of a state has no authority under the United States Statutes to honor requisitions unless accompanied by an affidavit mentioned in the act.

Compton vs. Alabama, 214 U. S., 1, 6, 53 L. Ed., 885, 886.

There is nothing in the case of

Grin vs. Shine, 187 U. S., 181, 190, 191; 47 L. Ed., 130, 136,

against the argument contained in this point.

The court in that case found that the document in the record was substantially a warrant of arrest, and then proceeded by a dictum to declare that the requirements of the U. S. Rev. Statutes, Compilation of 1901, Section 5270, page 3591, in effect modified the later extradition treaty with Russia of June 5, 1893 28 U. S. Stat. at L., p. 1071, and that provided the evidence of criminality was sufficient before the magistrate under the act, the absence of the depositions called for in the treaty was of no importance.

The case cannot possibly govern this question of the presenting of the formal demand in this case for the following reasons :

As to this the order of enactment is as follows :

Sec. 5270 of the U. S. Rev. Stat. was first enacted by the act of August 12, 1848, Ch. 167, Vol. 9, Stat. at L., page 302. It was amended by the act of June 19, 1876, Ch. 133, Vol. 19, U. S. Stat. at L., page 59, by an amendment substituting the thirty-eight words following the word "government" in the second line for the following words in the original act :

"It shall and may be lawful for any of the justices of the Supreme Court or judges of the several district courts of the United States, and the judges of the several state courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction and authority."

It was amended a second time by the act of June 6, 1900, Ch. 793, Vol. 31 U. S. Stat. at L., page 656, which added all after the word "provided" (See 3 Fed. Stat. Annotated, p. 68).

Note the concluding clause of the section before the proviso which clearly shows that even though criminality is established before the magistrate, the surrender must be "according to the stipulations of the treaty or convention."

The clause reads as follows :

"If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of a proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person according to the stipulations of the treaty or convention, and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

It follows that under the express provisions of Section 5270 in addition to the criminality before the magistrate, etc., although the person is committed to jail "there to remain until such surrender shall be made," the person is only to be surrendered "according to the stipulations of the treaty or convention."

It the case in hand the stipulation of the treaty or convention is as follows :

"and the person thus accused and imprisoned shall, from time to time, be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided ; if, however, the requisition, together with the documents above provided for, shall not be made as required by the diplomatic representative of the demanding government, or, in his absence, by the consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

It follows that the formal demand within the forty days is clearly made by the treaty a condition precedent of any extradition whenever the extradition is begun by a "requisition unaccompanied by a duly authenticated copy of the warrant for the arrest, or of the depositions upon which such warrant may have been issued."

In addition the true construction of Article 5 as supplemented and amended in 1884 is whether the requisition is begun by proceedings under the first clause, namely,

(a) A requisition accompanied by the documents mentioned, or

(b) By proceedings under the second clause, where no accompanying documents are provided for, the language of the treaty still requires that in both instances "the formal demand for his or her extradition shall be made and supported by evidence as above provided \* \* \* within forty days from the date of the arrest of the accused."

In fact this formal demand is a jurisdictional pre-requisite to the validity of the proceedings for extradition in any case.

The treaty involved is the treaty between the United States and Italy, known as the "Extradition Treaty of 1868," concluded March 23, 1868, ratifications exchanged September 17, 1868, proclaimed September 30, 1868 (See Senate Document No. 357, 61st Congress, 2d Session).

Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other powers, 1776-1909, compiled by Wm. M. Malloy under resolution of the Senate of January 18, 1909 (Res. No. 252, 60th Congress, 2d Session), Vol. 1, pp. 966-968.

and the further convention additional to the extradition convention of 1868, known as the "Convention of 1884," concluded June 11, 1884, ratifications exchanged April 24, 1885, proclaimed April 24, 1885.

*Id.*, Vol. 1, pp. 985, 986.

For the material portions of the Text see p. *supra*.

The Act of Congress involved is set forth in Sections 5270 and 5280 of the United States Revised Statutes, being originally founded on the Act of August 12, 1848, Ch. 167, 9 U. S. Stat. at Large, p. 302.

Whatever may have been the construction to be placed upon the treaty before the amendment of 1884 (and it may be conceded that no formal demand succeeding the original requisition was then required) the effect of the amendment of 1884 was to compel, in every case a formal demand in addition to either—

1st. The formal

“requisition for the surrender of fugitives from justice, accompanied by—

(A) A duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed; or

(B) Of the depositions upon which such warrant may have been issued,”

as required by the original provisions of Article V. of the treaty as it stood in 1868; or

2d. The

“requisition has been made by the government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime.”

as provided for by the amendment to Article V. made by the Convention of 1884, without any accompanying documents such as those which are required to accompany the “requisition for the surrender of fugitives from justice” provided for in the first part of Article V.

For the amendment of 1884 in adding a clause to the original Article V. of the treaty of 1868, and thereby allowing a “requisition \* \* \* to secure the preliminary arrest of a person,” etc., without any accompanying documents, goes on to provide as follows in Article III. of the amendment of 1884:

“These supplementary articles shall be considered as an integral part of the aforesaid original extradition convention of March 23, 1868, and together with the additional article of January 21, 1869 (an article including embezzlement in the crimes for which extradi-



dition would be allowed), as having the same value and force as the Convention itself, and as destined to continue and terminate in the same manner."

Therefore, the two parts of Article V. created by the Treaty of 1868 and the amendment Treaty of 1884, must, according to this express language, be construed as one whole.

For the full text of the material portions of the treaty see Statement of Facts.

It is evident that the very object and purpose of this clause Article III. in the amendment of 1884 was to make the last portion of the amendment of 1884, requiring that the requisition should be supported by the documents mentioned therein, apply distinctly to both ways of applying for extradition, namely :

1st. The "requisition for the surrender of fugitives" provided for in the 1868 draft of Article V. ; and

2nd. The "requisition to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime" as provided in Article II. of the Convention of 1884 amending Article V. of the treaty of 1868.

The effect is to provide that whether the proceeding is begun by the "requisition for the surrender of fugitives from justice", as per the first paragraph of Article V. of the treaty, accompanied by the documents mentioned in Article V. as it stood in 1868, or whether the proceeding is begun by the "requisition to secure the preliminary arrest" without the accompanying documents provided for in Article II. of the Convention of 1884 amending Article V. of the original treaty, the result is the same—that on the hearing before the Magistrate provided for, the government asking for the extradition must, within the forty days mentioned, produce "the requisition together with the documents above provided for."

Now, what are the documents "above provided for"? It will be seen that the first paragraph of Article V. as it stood in 1868 made no provision for the procedure which should be adopted in carrying it into effect, while the additional paragraph, made an integral part of the whole by the amendment of 1884, provides for the procedure whereby the covenants of the contracting parties under the treaty may be carried out in the courts of the respective

countries. It, follows, therefore, that the provisions of the second paragraph of Article V., added in 1884 to the first paragraph of Article V. as it stood in 1868, apply equally to judicial procedure of the character in question in this case whether the requisition has been made under the first paragraph and has been accompanied by the documents mentioned, or whether the requisition has been made under the second paragraph and been unaccompanied by documents. The result is that in both cases of requisitions called for by the first and second paragraphs of Article V. as they stand to-day the proceedings before the Magistrate as provided in the second paragraph of Article V. as it stands to-day apply to either character of requisition made by Italy, and that the further provisions of the last portion of the second paragraph of Article V. as it stands to-day apply to both forms of requisitions, and the procedure of Italy thereunder to enforce extradition in this country.

This is clear from the fact that the call for the documents "above provided for" in the second paragraph of Article V. as it now stands, refers back to the documents mentioned in the first paragraph, as is clearly seen from the preceding language in the second clause that "the person thus accused and imprisoned shall from time to time be remanded to prison until formal demand for his or her extradition shall be made and supported by evidence as above provided."

The "evidence above provided" clearly means the requisition, plus the duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued. In fact, under the decision of the courts construing the treaty it means either extraneous proof of criminality or the copy of the depositions, because the warrant alone is not proof, and this clause," supported by evidence as above provided gives clear meaning to the alternative clause succeeding. "If, however, the requisition, together with the documents above provided for, shall not be made."

It is also clear that the documents called for are not only the documents referred to in the first paragraph of Article V. as it now stands, namely, "A duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed or of the depositions upon which such war-

rant may have been issued", but in addition thereto that there must be

"A formal demand for his or her extradition" accompanying these documents and succeeding the requisition, whether such requisition takes the form of

(a) A requisition for the surrender of a fugitive from justice, accompanied by the documents mentioned in the first paragraph of Article V., or

(b) A requisition to secure the preliminary arrest of the person charged, unaccompanied by the documents mentioned, according to the second paragraph of Article V. as it now stands.

The treaty then goes on to provide

"And the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided; if, however, the requisition, together with the documents above provided for shall not be made, as required, by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

The treaty is conclusive and binding on this point as to the time within which the documents mentioned to support such a proceeding of extradition shall be presented.

Accordingly, if the Italian Government has failed within the forty days mentioned in the treaty to present what is here called the "dossier," namely, either the warrant, or the depositions upon which the warrant has been issued, there can be no doubt that the proceeding must fall, under the provisions of the treaty, since they are not presented within forty days from the date of the arrest.

Likewise, since the treaty calls over and beyond the original requisition accompanied by a copy of the warrant or depositions, or the preliminary requisition not so accompanied, for "a formal demand for his or her extradition" that must be "made and supported by evidence as above provided"

\* \* \* "within forty days from the date of the arrest of

the accused," it follows that the prosecution, not having furnished proof of this pre-requisite, the prisoner must go free.

Hence, forty days having elapsed since the date of the arrest without "a formal demand for his or her extradition" made, and in fact, down to date of hearing before the Magistrate no such formal demand having been made and proved in such hearing, these proceedings must fall and the prisoner under this enactment "shall be set at liberty".

Therefore, the prisoner being a citizen of the United States and protected by the constitutional guarantees against illegal arrest or detention, and the express terms of the treaty requiring, under the acts, his liberation from imprisonment, the court below was without jurisdiction in the premises except to grant the application for his discharge when so made.

### B.

UNDER THE TERMS OF THE EXTRADITION TREATY IN THIS CASE, IT IS OBLIGATORY UPON THE ITALIAN GOVERNMENT, IN PROSECUTING THESE PROCEEDINGS—THE HEARING BEFORE THE MAGISTRATE HAVING OCCURRED OVER FORTY DAYS AFTER THE ARREST,—TO PROVE BEFORE THE MAGISTRATE THAT A FORMAL DEMAND WAS DULY MADE WITHIN THE FORTY DAYS REQUIRED BY THE TREATY FOR THE SURRENDER OF THE PRISONER.

See assignments of error, 9th, 10th, 11th and 12th ;  
Rec., p. 193 ; 27th, 29th and 30th ; Rec., p. 197.

### **The Text of the Treaty Implies Presentation of the Demand and Other Documents to the Magistrate.**

It is admitted that had the hearing before the magistrate taken place within forty days after the arrest that then perforce of the terms of the Treaty it would have been the duty of the magistrate if on the other grounds mentioned he decided against the prisoner to so order that the "person thus delivered and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by the evidence as above provided."

And just as clearly does the Treaty provide that (whether the hearing is had before or after the expiration of the forty days after the arrest).

"If, however, the requisition together with the documents above provided for (equal the mandate—copy of the sentence duly authenticated if convicted copy of the warrant of arrest or the depositions on which the warrant issued and the formal demand) shall not be made as required by the Diplomatic Representative of the demanding government, or in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

Under this language it is clear that it is the magistrate who is to act on the detention of the accused until the 40 days after the arrest have passed and it is the magistrate who even if he finds him subject to extradition must not commit him for extradition but remand him to prison from time to time "until a formal demand for his extradition shall be made" etc. and if such formal demand is not made "within forty days from the date of the arrest of the accused the prisoner shall be set at liberty."

It is respectfully submitted that under this treaty requirement the "clear meaning is that not only the "formal demand" but the requisition, original request on which mandate issued and the duly authenticated copy of the sentence in case of conviction or the duly authenticated copy of the warrant for his arrest or of the depositions upon which such warrant may be issued shall not be made "*to the Magistrate*" by the Diplomatic Representative of the demanding Government or in his absence by a consular officer thereof within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

We say the requirement is that these documents shall be presented to the Magistrate within the 40 days.

It is suggested that the proper place to present them is to the office of the Secretary of State since in Diplomatic communications between nations they respectively act through their foreign office.

The reply is that however true this may be ordinarily we are here dealing with the positive requirements of the treaty and the clause in which this requirement occurs clearly shows

that the requirements are made with reference to the proceedings before the magistrate and not with reference to proceedings elsewhere.

Thus the clause authorized "any competent judicial magistrate of either of the two countries" after the exhibition (of the mandate) "and on complaint duly made under oath by a person cognizant of the fact or by a diplomatic or consular officer of the demanding government \* \* \* and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated."

Here there is no question of any action between the Diplomatic representatives except the necessity for a request for a mandate under the 1868 portion of Article 4 and the issue of the mandate from our Secretary of State before proceedings will lie.

When below referring to the magistrate remanding the accused during the 40 days the treaty goes on to say "if, however, the requisition together with the documents above provided for (*i. e.*, formal demand copy of sentence or copy of warrant or depositions) by the Diplomatic Representative or, in his absence, by a consular officer thereof" by the use of the same language as above and the mention of a Consular officer, the treaty clearly shows it means a presentation of such documents by either of said persons not to the office of the Secretary of State—for the matter is now in the hands of the magistrate but to the authority who, on the faith of this evidence, is to release or not to release the prisoner accordingly on the expiration of the 40 days unless such documents are presented namely—the magistrate who has the case in hand.

Therefore, under the true construction of this treaty and on the facts, the prisoner should now be set at liberty.

This because no formal demand was ever made or presented to the magistrate within 40 days or down to date.

No papers supporting such demand namely in this case copy of warrant and depositions was ever made or presented to the magistrate until August 11, 1910—the 40 days having expired on August 3, 1910.

Hence these proceedings then fell under the express terms of the Statute and the prisoner should be discharged. To hold otherwise is to hold that the papers are required by the treaty to be presented somewhere else than before the magistrate—

who is to decide the question of performance of the treaty requirement—and that without anybody being under any duty to bring the fact to his attention—the magistrate must still decide as to whether the 40 day clause has been complied with.

As well can you hold that without the production of the requisition and warrant or depositions required by the treaty in evidence before the magistrate, the magistrate could hold the prisoner because such documents were on file in the Secretary of State's office.

The construction that the Treaty makes it the duty of the Italian Government to present these papers to the magistrate who has the matter in charge within the 40 days or lose the benefit of the proceeding is the fair and reasonable construction.

It produces no hardship in this case because under the decisions in case of dismissal on this ground a new proceeding can be begun on the same documents and the 40 day requirement can then be observed.

On this ground alone the prisoner is entitled to his discharge.

## POINT V.

**On Habeas Corpus and Writ of Certiorari to review the decision of the magistrate in extradition proceedings the hearing must be on the record below.**

See Assignment of Error 33rd, p. 197, etc.

On the hearing of the *habeas corpus* and *certiorari* proceedings before the Circuit Court below against the objection and exception of petitioner's counsel, the judge allowed the respondent to put in evidence a certified copy of the alleged formal demand made by the government of Italy upon this government for the extradition of Charlton (Record, p. 199).

Thereupon, without prejudice to this objection, petitioner's counsel put in evidence the diplomatic correspondence between the governments with reference to this demand and the corres-



pondence between the Secretary of State's office and petitioner's counsel in respect to the demand (Record, p. 200).

It is respectfully submitted that the admission in evidence of the said formal demand was legal error and that the case on *habeas corpus* should have been heard solely on the record before the magistrate in the extradition proceedings below.

There is considerable conflict in the authorities in regard to this question of practice—a conflict which it is deemed arises from the extreme diversity of facts under which *habeas corpus* proceedings are taken and brought on.

Where no court commitment of any kind exists, a *habeas corpus* necessarily brings up all the facts at issue between the parties.

An example of such case is a dispute over the custody of an infant.

Where court commitments exists, the latter authorities have tended to draw a distinction between *habeas corpus* to review commitment by a magistrate before indictment (9 Amer. & Eng. Ency. of Law, 1st ed., p. 193) and *habeas corpus* to review a commitment after indictment (9 Amer. & Eng. Ency. of Law, 1st ed., p. 193).

In the first class, where no indictment has been had, the practice has been to inquire pretty generally into the facts, if necessary.

In the second class, it is reasonably well settled that the writ of *habeas corpus* acts not as a writ of error or on appeal to correct errors or mistakes of the magistrate or court below, but as a means of reviewing only the question of jurisdiction over the person or the subject matter.

*Sternamen vs. Peck*, C. C. A., 80 Fed., 883 ; 26 C. C. A., 214.

Thus in New Jersey, the state in which the *habeas corpus* below was tried, it is held that the *habeas corpus* act (Rev., p. 468, 25th section), does not authorize the court or justice before whom a writ of *habeas corpus* is returned, showing that the prisoner is detained by virtue of a legal *capias ad respondendum* to examine into and decide upon the sufficiency in fact of the proofs upon which the order for the *capias* was founded.

*Selz vs. Presburger*, 49 N. J. Law, 396.

Strictly speaking, since the writ of *habeas corpus* brings up only the body, where the detention is by authority of law, a legal commitment by a magistrate—the suggestion of such a commitment in the return is a complete answer to the writ and the writ must be discharged.

Accordingly it is customary to prevent this situation by suing out a writ of *certiorari* at the same time that the *habeas corpus* is obtained. This has the effect of bringing up the record below for inspection by the higher court.

The rule is that after indictment the review by *habeas corpus* of the magistrate's commitment is solely dependent upon jurisdictional questions over person and subject matter.

4 Ency. of Plead. & Prac., p. 1058.

It is submitted that a commitment by a magistrate in extradition proceedings followed, as it was in this case, on action of the court at Como equivalent to an indictment, makes the rule of *habeas corpus* applying to commitments on indictments apply to this commitment.

As to writs of *certiorari*, the rules are laid down as follows:

On writs of *certiorari*:

"The hearing, in the absence of statutory authority to the contrary, is on the record as returned, and the reviewing court confines itself to an inspection of such record."

4 Ency. of Plead. & Prac., p. 277.

"Although the rule as to the conclusiveness of the return may be changed by statute, and in some states has been to some extent so changed, it would seem that the court will not consider matters *dehors* the record, unless authority to do so is conferred in unmistakable terms. Thus, it has been held that a statute authorizing the court to proceed and to give judgment in the cause, as the right of the matter may appear, without regarding technical or formal omissions or defects in the proceedings, does not confer upon the court the power to consider extraneous evidence; and a statute providing that the records of the inferior tribunal shall

be conclusive as far as the same extend does not deprive the record as returned of its conclusiveness" (*Id.*, pp. 279, 280).

"Even for the purpose of supporting the record of the inferior tribunal, or of sustaining its judgment, extrinsic evidence is inadmissible."

See note. *Id.*, pp. 280, 281.

"It is not permissible for the purpose either of determining the merits of the controversy or proceeding, or of showing what transpired before the inferior tribunal, to hear oral evidence or to read affidavits. Nor will the court hear depositions, although they were taken to be used in the lower court, as they form no part of the record" (*Id.*, 282, 284).

"Where the inferior tribunal returns matters which do not properly constitute a part of the record, and which therefore ought not to have been incorporated in the return, such surplusage will be disregarded" (*Id.*, 284).

As to the rule to be applied in extradition proceedings themselves, the following cases are in point :

JUDGE BLATCHFORD, construing Section 761 of the United States Revised Statutes reading

"761. The court, or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require,"

held as follows (the case being a *habeas corpus* to review commitment by a magistrate in extradition proceedings) :

"Where a person is held on process on a final judgment, after conviction on a trial on an indictment, and a *habeas corpus* is issued, and the return to the writ states the process as the cause of detention, the 'facts' the court is required to determine, either on such return alone or by aid of a *certiorari*, are the final judgment, the conviction, the fact of a trial, and the indict-

ment. The particulars of the evidence which led to the conviction are no part of such 'facts.'

*In re Stupp* (1875), 12 Blatchf. (U. S.), 501.  
Fed. Cases, No. 13,563.

In the case of

*Ex parte Lane*, 6 Fed. Rep., 34,

on a writ of *habeas corpus* and *certiorari* to review a commitment in an extradition proceeding, there was submitted a further certificate intended to cure certain technical defects in the proceedings before the magistrate.

The Court held as follows :

"In the case under consideration, however, the complaint does not purport to have been made by an officer, nor does it give any reason why it is made simply upon his best knowledge, information and belief. It is true that after the writ of *certiorari* was issued and served upon the commissioner he added a further certificate to his return, setting forth that the complainant was in fact superintendent of police, and that he exhibited to the commissioner, at the time of issuing the warrant, a complaint on oath, purporting to have been made in writing before a police magistrate, charging Lane with forgery and the utterance of a forged paper, as set forth in the complaint, and the warrant issued thereon; and that he was also attended by a person who claimed to be crown attorney of the county within which the offence was committed. I do not feel at liberty, however, to take notice of a certificate thus made, after the service of the writ."

*Ex parte Lane*, 6 Fed. Rep., 34, 40.

In

Knowltons Case (Col. 5, Crim. Law Mag., 257),

cited in

9 Amer. & Eng. Ency. of Law (1st Ed.), p. 256,

it was held

"In extradition proceedings, the court should decide upon the facts stated in the return to the writ of *habeas corpus* and not upon those subsequently occurring."

In  
 9 Amer. & Eng. Ency. of Law (1st Ed.), p. 199,  
 it is stated :

“ Where the facts stated in the return to a writ of *habeas corpus* are not controverted, the issue raised is one of law simply, and no fact outside of the record can be legally considered.”

In this connection it may be stated that in

*In re Mayfield*, 141 U. S., 107, 35 L. Ed., 638,  
 the concluding clause of the opinion appears to rule contrary to the foregoing argument.

It is respectfully submitted, however, that the facts in the *Mayfield* case and in the other cases cited were not the facts of extradition cases, and that the rule there stated should be confined to the facts involved in the cases cited.

In this connection it should be borne in mind that to allow in these extradition cases a new record to be made up in the *habeas corpus* proceeding (which is in effect a proceeding on appeal—see the numerous cases in this court sustaining its jurisdiction in *habeas corpus* as being in the nature of an appellate jurisdiction and not an original jurisdiction beginning with

*Ex parte Yerger*, 75 U. S., 85 ; 19 L. Ed., 332,  
 is to work a hardship upon the petitioner ; while to hold both parties to the record before the magistrate is a salutary rule. For even if the government should be beaten on such a *habeas corpus* ; and the facts exist on which it can be entitled to relief, a new extradition proceeding is open to it.

*It is submitted, therefore, that, in view of the fact that in extradition cases the further proceeding by habeas corpus and certiorari is in the nature of an appellate proceeding, brought in that form only because no writ of error lies, the rules as to appellate courts should apply to such proceedings, and the hearing be had solely on the record below.*

In the extradition case of

*Terlinden vs. Ames*, 184 U. S., 270 ; 46 L. Ed., 534.

A complaint was made before the magistrate with documents attached, and the accused was arrested and held for examination, etc.

Before the examination took place or any evidence was taken before the magistrate a *habeas corpus* was sued out on behalf of the accused, and attached to the *habeas corpus* were some but not all of the papers which had been used before the magistrate.

On the return day in traversing the return attempt was made by the petitioner to introduce a further portion of these papers. It was held that this could not be done, that they should have been included in the petitioner's application.

And the court says, p. 279 :

" This was manifestly insufficient. Petitioner could not select a portion of the documents accompanying the complaint and ask the court to sustain his conclusion of law thereon. Nor could he subsequently supply the inadequacy of the traverse *by a certiorari, which could do no more, IF IT COULD BE, IN ANY VIEW, PROPERLY ISSUED AT THAT STAGE OF THE PROCEEDINGS, than bring up what he should have furnished in the first instance.*" <sup>1</sup>

Referring to the matters before the court below on the *habeas corpus*, the court says, p. 278 :

" The statute in respect of extradition gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly can not be done indirectly through the writ of *habeas corpus*. The court issuing the writ may, however, 'inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute ; whether he exceeded his jurisdiction ; and whether he had any legal or competent evidence of fact before him on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion.' " Blatchford, J., *Re Stupp*, 12 Blatchf., 501, Fed. Cas., No. 13,563 ; *Ornelas vs. Ruiz*, 161 U. S., 508, 40 L. Ed., 787, 16 Sup. Ct. Rep., 689.

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<sup>1</sup> The italics are ours.

On the foregoing it is respectfully submitted that on *habeas corpus* in extradition proceedings, the rule is that the hearing on *habeas corpus* must be had on the record as it existed before the magistrate and not otherwise.

It was legal error, therefore, to admit other evidence in this proceeding.

On this objection the alleged formal demand from Italy within 40 days and the alleged proof of its date of receipt stamped thereon should be stricken from the record.

This done the diplomatic correspondence and correspondence between the Hon. Secretary of State, and petitioner's counsel must go with it, since counsel had a right to introduce this as explaining the demand without prejudice when his objection was overruled.

With these documents struck from the record, there remains only the record before the magistrate and this contains no proof of any formal demand made within the 40 days after arrest or at any other time to date.

An essential prerequisite of the Treaty not having been complied with, the prisoner should be discharged according to its command.

## POINT VI.

**The alleged formal demand, in view of the diplomatic correspondence preceding it and referred to in it, is not the "formal demand" within the meaning of the treaty. It is simply a request under the comity of international law?**

(See Assignments of Error, 31st and 32nd, Rec., p. 197).

### I.

*It is settled law in this Court that when on matters of this character the treaty of statute requires some act to be done based on the presence or absence of certain formal documents the exis-*



*tence of such formal documents is jurisdictional—without them the case falls.*

See *Tucker vs. Alexandroff*, 183 U. S., 424, 46 L. Ed., 264.

*Compton vs. Alabama*, 214 U. S., 46, 53 L. Ed., 885, 886.

The case of

*U. S. vs. Rauscher*, 119 U. S., 407, 30 Law Ed., 425, is authority for the proposition that questions of this character are law questions for this Court and not political questions to be foreclosed from inquiry by this Court under the guise of diplomatic construction.

Nothing in the case of *Terlinden vs. Ames*, 184 U. S., 270, affects this proposition—in view of the manifest distinctions in the facts of the case.

It follows that on the record in this matter as it stood and now stands of the proceedings before the magistrate the proceeding should have been dismissed and the prisoner discharged.

For the express language of the act is

“and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided” (*Rec.*, p. 13).

Note the arrest was on June 24, 1910; the hearing before the magistrate was on September 21, 1910, more than 40 days after the arrest.

The magistrate's commitment was on October 15, 1910; and no proof of any such formal demand within the 40 days was made or ever has been made before the magistrate, although the point was distinctly taken on motion to dismiss.

(*Rec.*, pp. 46 and 58.)

(*Assignment of Error* 9th, 10th, 11th, 12th, *Rec.*, p. 193, and 27th, 29th, and 30th, *Rec.*, p. 197.)

On the hearing on the *habeas corpus* and writ of *certiorari*, however, against the objection and exception of petitioner's counsel proof of an alleged formal demand within the 40 days was admitted.

(*Rec.*, pp. 199, 200.)

(33rd *Assignment of Error*, p. 199.)

The material part of this formal demand reads as follows :

“ MANCHESTER, MASS., July 28, 1910.

MR. SECRETARY OF STATE :

Referring to previous communications and in accordance with the provisions of Article V. of the Extradition Convention of March 23, 1868, I have the honor to lay before your Excellency a *formal request*<sup>1</sup> for the extradition of Porter Charlton,” etc., etc.

“ MONTAGLIARI ”.

Now, were this the ordinary case of two nations acting under an extradition treaty where no dispute had existed between them which the requirement and observance of such “ formal demand ” by one upon the other might affect, it is frankly admitted that criticism upon any form of demand whatsoever would be hypercritical and without weight or merit.

But facts alter cases and under the provisions of this treaty in view of the diplomatic dispute so pointed and acute, the requirement of this treaty that after the original request for extradition has been made and after the man has been arrested and held on hearing that

“ the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by the evidence ; as above provided, if, however, the requisition together with the documents above provided for shall not be made as required \* \* \*, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty ”

means that the formal demand must be a demand under the obligations and law of the treaty—or its requirement is a meaningless formality.

It is necessary, therefore, from the express terms of this “ formal request ” to read into it and in connection with it the

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<sup>1</sup> Italics are those of counsel.

"previous communications referred to" in order to ascertain whether this is the kind of the "formal demand" which fairly complies with the Treaty requirement.

These communications are set forth in detail in the specifications of error in Part II. herein.

Let us then in the light of this correspondence so summarized and expressly referred to and made a part of this formal request rewrite that request by inserting the substance of that correspondence in the right place and see how it reads.

MANCHESTER, MASS., July 28, 1910.

MR. SECRETARY OF STATE :

Referring to previous communications  
(in which I informed you that

"It was not on the strength of the Existing Treaty of Extradition that I had the honor to apply to your Excellency with a request that you kindly take measures for the eventual arrest of the said Charlton" and thereafter in answer to your inquiry as to "whether or not the Department (U. S. A. State Dept.) is to understand that by instituting extradition proceedings for the surrender of this American citizen accused of committing murder in Italy your (my) Government wishes to be understood as surrendering its view heretofore entertained and as being now willing to adopt as to cases which may hereafter arise between the two Governments the view that the extradition treaties of eighteen sixty eight eighteen sixty nine and eighteen sixty four between the United States and Italy require the surrender by each Government of any and all persons irrespective of nationality \* \* \*," and further and specifically inquired "whether the Government of Italy now proposes as to all cases arising in the future to deliver to the Government of the United States under and in accordance with the Treaty provisions those Italian subjects who committing crimes in the United States take refuge in Italy and to which I answered "I now have the honor to inform Your Excellency that the King's Government cannot depart from the principle established by our law that our nationals cannot be surrendered to foreign powers.

Furthermore, this principle does not conflict with the provisions of the Extradition Convention. Indeed, it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation.

The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try on the request of a foreign Government, their nationals who may have committed offenses on that Government's Territory.)

Rec., P. 158.

"and in accordance with the provisions of Article 4 of the Extradition Convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton."

*A more self contradictory formal demand or as it styles itself with nice precision "formal request" for extradition under the treaty could not be imagined.*

The truth is that this "formal request" is not the "formal demand" under the treaty because it expressly disclaims intention to make demand under any right or obligation conferred by the treaty. Not daring to use the word "demand" the word required in the treaty but which might be construed as waiving Italy's construction in spite of her disclaimer the demand ends up with the weaker word "request."

THIS WORD "REQUEST" IS CHOSEN WITH NICE PRECISION TO CHARACTERIZE A REQUEST UNDER INTERNATIONAL COMITY WHICH THIS REQUEST IS, BUT IS THE WRONG TERM IF, UNDER THE FACTS OF THIS CASE AND THE FORMER DISPUTE, RIGHTS ARE CLAIMED BY ITALY UNDER THE TREATY.

It is respectfully insisted that the form of demand used in this case, a formal untruth as a demand under the treaty and in substance a request under International Comity should not be allowed by this court as the "formal demand" required by the treaty.

Surely in an ordinary litigation between private persons

neither would be allowed to base a right on such a demand as being a demand called for under their contract in the sense here claimed by the Italian Government.

Given the diplomatic dispute and Italy's admitted breach, the only kind of a *formal demand* in this case which this Government could possibly be bound to observe would have been a formal demand accepting the American construction of the covenants in the treaty and agreeing to be bound by them pursuant to the formal demand then made under the treaty.

The demand in question not being a demand under the treaty is of no more effect than if no demand at all had been made.

Since the right of a citizen is involved and the facts admitted, this is not a question to be foreclosed by the fiat of diplomatic construction.

U. S. vs. Rauscher, 119 U. S., 407; 30 Law Ed., 425.

Thus, the 1st definition given in the Century Dictionary of the word "formal" and the only one properly and peculiarly applicable to its use in this context under the circumstances is as follows:

"Formal. \* \* \* According to Form, rule, or established order; according to the rules of law or custom; systematic; regular; legal."

So here a "formal demand" prescribes a "formal demand" according to the treaty,—i. e., the rules of law of the treaty,—not one which on its face repudiates the very obligations of the treaty under which the pseudo request is made.

It follows that the formal request in this case is of no more effect—not being of the *bona fide* kind required by the treaty under the circumstances—than if none had been made.

The claim that the "formal request" in this case is a "formal demand" under the treaty smacks more of the pettifogging practice of a New York tombs lawyer than of the dignified and candid character of communication that should exist in diplomatic correspondence between two great nations.

Italy should be allowed to obtain no advantage in this litigation from such a piece of apparent chicanery.

## POINT VII.

“ The writ of *habeas corpus* is a proper remedy for reviewing proceedings for the deportation of an alien, but only for the purpose of ascertaining whether or not jurisdiction has been exceeded.”

21 Cyc. of Law & Prac., p. 292 ;  
citing—

United States vs. Jung Ah Lung, 124 U. S., 621 ;  
31 L. Ed., 591,

and other cases.

“ The writ of *habeas corpus* is a proper means for reviewing proceedings for the extradition of a fugitive from justice, but if the officer has jurisdiction of person and subject matter and there is competent legal evidence on which to exercise his judgment, his action is conclusive and the accused is not entitled to be discharged.”

21 Cyc., 292.

In *habeas corpus* cases of this description, an appeal lies direct from the United States Circuit Court to the United States Supreme Court.

Rice vs. Ames, 150 U. S., 371, 45 L. Ed., 577.  
Pettitt vs. Walshe, 194 U. S., 205, 216.

The act of March, 1891, §§ 4 and 5, allows appeals from the District and Circuit Courts direct to the Supreme Court.

“FOURTH. In any case that involves the construction or application of the Constitution of the United States ;

FIFTH. In any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.”

Both clauses are involved here.

**POINT VIII.**

**For the reasons above stated, the decision below should be reversed and the prisoner discharged.**

Respectfully submitted,

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## APPENDIX.

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**Under the Imperfect obligation to extradite on request in International Law an arbitrary discretion is vested in the Sovereignty which under our constitutional limitations cannot be exercised by the executive against the rights of the citizen.**

### I.

No rule of international law fastens on any government the obligation to extradite a fugitive from justice from a foreign government seeking refuge on our shores, whether such fugitive be a citizen of the demanding government or of the United States.

4 Moore on Int. Law, Sec. 580.

"The laws of nations embrace no provision for the surrender of persons who are fugitives from the offended laws of one country to the territory of another. It is only by treaty that such surrender can take place." *Id.*

Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, April 9th, 1817, MS. Notes to For. Leg. II., 218.

See instructions of Mr. Jefferson, Sec. of State, to Messrs. Carmichael & Short, March 22, 1792, with reference to negotiations with Spain.

(American State Papers, For. Rel., I., 258.)

Mr. Buchanan, Sec. of State, writing to Mr. Wise, Sep. 27, 1845, MS. Inst. Brazil XV. 119, says :

"The truth is that it has been for a long time well settled, both by the law and practice of nations, that, without a treaty stipulation, one government is not under any obligation to surrender a fugitive from justice to another government for trial."

The foregoing authorities intimate that while there is no obligation, it might be done as a matter of courtesy in the case of a person not a citizen of the United States.

## II.

IN THE ABSENCE OF A STATUTE OR TREATY TO THAT EFFECT, THERE IS NO LEGAL POWER IN THE EXECUTIVE DEPARTMENT TO EXTRADITE CRIMINALS SEEKING REFUGE HERE, WHETHER CITIZENS OF A FOREIGN GOVERNMENT OR OF THE UNITED STATES.

4 Moore Int. Law, Sec. 581, p. 248.

"The President has no power 'to make the delivery, unless under treaty or act of Congress.'"

*Id.*, Sec. 581, p. 248,

Citing

Wirt, Atty. Gen., 1821, 1 Opinions, 509, 521.

Legare, Atty. Gen., 1841, 3 Opinions, 661.

See to the same effect, Mr. Rush, Sec. of State, to Mr. Hyde de Neuville, French Min., April 9, 1817, MS. Notes to For. Leg. II. 218 ;

Mr. Gallatin, Min. to France, to Min. for For. Aff., April 23, 1817, enclosed with Mr. Gallatin's No. 41, Aug. 20, 1817, 18 MS. Desp. From France ; Mr. Adams' Sec. of State, to Mr. Bagot, Brit. Min., Dec. 29, 1817, and May 2, 1818, MS. Notes to For. Leg. II., 269, 324 ;

Same to Mr. Antrobus, May 11, 1819, MS. Notes to For. Legs., II., 367.

Every citizen of the United States being secured by the Constitution against unreasonable arrest, and magistrates being prohibited from issuing warrants except on probable cause, supported by oath or affirmation, the President cannot order the arrest of the master of an American vessel and his confinement for trial upon a communication from the British Minister, accompanied by copies of depositions taken before a Justice of the Peace of the Island of Antigua, charging him with the murder of a British subject on the high seas.

Berrien, At. Gen., 1829, 2 Op., 267.

Mr. Vaughan, the British Minister, having requested the extradition of one Andrew Cawlen, charged with

the murder of two persons in England, Mr. Forsyth, by direction of the President, replied that, in the absence of an appropriate treaty between the two countries, the authority of the Executive 'to exercise an act of such important effect upon the rights of personal security is more than questionable,' and that the case was therefore 'without any remedy in the competency of this government to apply.'

Mr. Forsyth, Sec. of State, to Mr. Vaughan, July 7, 1834, MS. Notes to Br. Leg., VI., 1.

The language of this reply was taken from Mr. Adams' Note to Mr. Bagot, the British Minister, of May 2d, 1818, MS. Notes to For. Legs., II., 324.

See to the same effect Mr. Forsyth, Sec. of State, to Mr. Cass, Min. to France, May 29, 1840, MS. Instr. France, XIV., 261; Mr. Upshur, Sec. of State, to Mr. Everett, Nov. 23, 1843, MS. Instr. Great Britain, XV., 177; and other letters cited in Moore on Extradition, I., § 16, p. 21.

The duty to grant extradition is not deducible from the most-favored-nation clause in treaties of commerce and navigation.

Cushing, Att. Gen., 1853, 6 Op. 148."

4 Moore Int. Law, Sec. 581, pp. 248, 249.

A. A single exception occurred in 1864 in the slave trade case of a Spanish subject Arguelles, who was surrendered by Mr. Seward during the Civil War without an opportunity for *habeas corpus*.

The single exception in actual practice of the State Department is to be found in the case of Don Jose Augustin Arguelles, a Spanish subject and an officer of the Spanish army, who was charged with having clandestinely sold into slavery part of a cargo of African negroes which he had captured, and for the capture of which he had received a large sum of prize money. This case occurred in New York in 1864. Arguelles was seized and delivered up at New York to an agent of the Captain-General of Cuba and conveyed back to that island. The proceedings were so summary that no opportunity was allowed to obtain a writ of *habeas corpus*.

As no opportunity was allowed for a *habeas corpus*, the legality of the act was never passed upon by a court. The Secretary, however, was called to account for his act by Congress, and on June 24, 1864, filed a letter with the Chairman of the Judiciary Committee of the House of Representatives in justification of his action.

It is sufficient to say that his argument stands alone without justification or support from other authorities, and the official act and its attempted justification may be referred to the passions and prejudices of the slavery agitation then being fought out in the greatest civil war of modern times.

It is to be noted that the case involved a Spanish and not an American citizen.

Secretary Seward's action in the case has been most severely commented on by high authority.

Mr. Spears says :

"The delivery of Arguelles, being wholly without any legal authority, was not at all excusable by the fact that the alleged fugitive was supposed to be guilty of a heinous offense. This supposition, if true, does not change the principle of the nature of the act. Rules of law do not vary with the merits or demerits of the particular case to which they are applied."

Spear, Extradiction, p. 13.

This condemnation is cited with approval by Judge MAXEY in the case of

*Ex parte McCabe*, 46 Fed., 363, 372.

B. The validity of the exception is denied by all other authorities, and the case has no application to the case in hand because Arguelles was a Spanish subject, and, as such, an alien (*Ibid.*).

C. In regard to the right of deportation or banishment, a valid distinction arises between the power of the United States Government over its citizens and over aliens.

Thus in the case of Alexander Trimble, an American citizen, whose extradition was demanded in 1884 by the Government of Mexico, Mr. Frelinghuysen said: "that, by the opinions of several attorneys general, by the decisions of our

courts, and by the rulings of the Department of State, the President has not, independent of treaty provisions, the power of extradicting an American citizen; and the only question to be considered is whether the treaty with Mexico confers that power."

See Report of Mr. Frelinghuysen, Sec. of State, to the President, Feb. 13, 1884, S. Ex. Doc. 98, 48th Cong., 1st Sess., cited in 4 Moore, p. 281.

Mr. Bayard says:

"A long and almost unbroken course of decisions has established it as a rule of executive action not to grant the surrender of fugitive criminals except in pursuance of a treaty."

Mr. Bayard, Sec. of State, to Mr. Davis, May 29, 1886, 160th MS. Dom. Letters, 354.

See, also, Mr. Bayard, Sec. of State, to Baron d'Almeirin, Portuguese Charge, June 4, 1888, For. Rel. 1888, II., 1394.

Mr. Gresham says:

"In the absence of a treaty or an Act of Congress authorizing it, the President has no authority to cause the arrest and extradition to another country of an alleged criminal found within the jurisdiction of the United States."

Mr. Gresham, Sec. of State, to Mr. Suza Rosa, June 5, 1895, MS. Notes to Portugal, VII., 171.

See, to the same effect, Mr. Gresham, Sec. of State, to Mavroyeni Bey, Turkish Min., Aug. 23, 1894, For. Rel. 1894, 730.

As late as 1898, Mr. Day said:

"In the United States the general opinion and practice has been that, in the absence of a convention or legislative provision, there is no authority in the government to deliver up a fugitive criminal to a foreign power."

Mr. Day, Sec. of State, to Mr. Viso, May 26, 1898, MS. Notes to Argentine Leg. VII., 29.

“ ‘ In the United States the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore on Extradition, 21 ; U. S. vs. Rauscher, 119 U. S., 407.’

Terlinden v. Ames (1902), 184 U. S., 270, 289.

See, also,

Tucker v. Alexandroff (1902) 183 U. S., 424, 431.”

Moore on Extradition, in referring to the Trimble case, says :

“ The government of the United States declined to order his surrender on the ground that as the treaty negated any obligation to do so, the President was not invested with legal authority to act. To this position the Government of the United States has adhered.”

1 Moore on Extradition, § 35, p. 167.

The clause in the treaty in question, which was alleged to inhibit the legal right to extradite, was the somewhat usual clause providing that neither of the contracting parties “ should be bound to deliver up its own citizens.” From this was inferred the prohibition of any legal authority in the Executive Department to deliver up citizens.

The practice of the Executive Department with reference to the principle involved is also indicated by the numerous cases in which, in requesting as a matter of favor the extradition of citizens of other countries from foreign governments to our own governments for trial for alleged crimes, we have repeatedly stated that the request should not place us under any legal obligation to reciprocate the favor, as we were powerless to reciprocate under the conditions stated.

See 4 Moore on International Law, Sec. 582.

It must be noted that the case of

Mattie D. Rich,

a woman and an American citizen, who, in 1899, was surrendered to the Mexican Government on the charge of the murder of her husband in Mexico, the deceased husband being a citizen of the United States as well, is not an authority to the contrary against the foregoing argument, because under the

express terms of the treaty with Mexico, in that case the President was given full authority and discretion in the premises to extradite a citizen of the United States.

Thus, Art. IV. of the Treaty provided that neither party should be bound to deliver up its own citizens, but that "the executive authority of each shall have the power to deliver them up if, in its discretion, it be deemed proper to do so."

4 Moore Int. Law, Sec. 594, p. 303.

Under this treaty, therefore, there was express authority granted by the treaty making power to the Executive, giving authority to exercise this arbitrary discretion and for the delivery of an American citizen under the circumstances stated—facts entirely absent from the case in hand.

*The constitutional guarantees do not apply to aliens, and the government has the power, under international law,*

A. To exclude aliens from the country.

(Chinese Exclusion Cases, 130 U. S., 581, 599 *et Seq.*).

B. To deport them even after entering and becoming residents here.

(Chinese Deportation Cases, 149 U. S., 730).

That a true distinction exists under the extradition act as between the rights of a citizen of the United States and of an alien appears from the decision of this Court in the Chinese Exclusion Cases.

The original Chinese Exclusion Cases—

Chae Chen Ping vs. U. S., 130 U. S., 581, 611; 32 L. Ed., 1068,

had held the following propositions :

**1st.** That the act of Congress prohibiting the entry or return of Chinese to the United States was a denunciation and repeal of the treaty between China and the United States, which had expressly provided that the right of entry should not be absolutely forbidden.

**2nd.** That a certificate given under the provisions of a prior act permitting the return of a Chinese resident who had



obtained the certificate, returned to China, and was thereupon returned to the United States, from thereafter entering the United States, was not a contract or property right which could survive Congressional repeal of the treaty.

3rd: That the power of the United States to exclude Chinamen lay in the Legislature under international law, and was a right of sovereignty, and that no provision of the United States Constitution was violated.

Thereafter, because of evasions of the United States Exclusion Act difficult of discovery, Congress passed a Chinese deportation act of May 5, 1902, which provided for the deportation of all Chinamen who could not prove their former residence in the United States in a certain manner required in the act.

On *habeas corpus*, a decision against the Chinese having been made by the lower courts, the question was certified to the Supreme Court, where the prevailing and dissenting opinions split upon the single question as to whether resident aliens were protected by the provisions of the constitution which protected citizens.

Fong Yue Ting vs. U. S., 149 U. S., 730; 37 L. Ed., 919.

The prevailing opinion, delivered by Judge GRAY, founded itself upon the principle of international law that whether in war or peace—

“The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of the sovereignty to be seriously contested.”

Citing Whart. Int. Law. Dig., Sec. 206, and 130 U. S., 607.

The dissenting opinions founded themselves upon the distinction between temporary travelers and resident aliens who had obtained home and property rights, and declared that the legislation was a sentence of banishment, and as such, absolutely void under the provisions of the

Constitution, which were claimed to be equally applicable to resident aliens as to citizens.

It follows that the distinction raised arising out of the guarantees of the Constitution in case of aliens is one sustained by the decisions of the United States Supreme Court, above cited.

It follows, therefore, that so far as concerns the rights of the citizens, the authorities are uniform without exception that no legal right exists to extradite a citizen by reason of the constitutional guarantees unless pursuant to a treaty of extradition or Act of Congress.

*Supra*, Points I. and II.

1 Moore on Extradition, § 35, p. 167.

### III.

THE CONSTITUTIONAL GUARANTEES APPLICABLE TO A CITIZEN  
ARE CONTAINED IN THE AMENDMENTS AS FOLLOWS :

#### "ARTICLE IV.

*The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and persons or things to be seized."*

#### "ARTICLE V.

*No person shall be held to answer for a capital or otherwise infamous crime unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation."*

## IV.

AN EXTRADITION TREATY IS IN THE NATURE OF A DEPORTATION ACT, AND IS WITHIN THE CONSTITUTIONAL POWERS OF THE NATION UNDER THE TREATY MAKING POWER, BUT NEITHER THE EXECUTIVE NOR THE COURTS, UNDER THE FOREGOING PROVISIONS OF THE CONSTITUTION, ARE ENTITLED TO GO BEYOND THE ENACTMENT SO MADE.

It follows that both the executive and the courts are without authority to detain or extradite a prisoner unless authority be found either in—

A. A treaty, or

B. An act of Congress.

4 Moore Int. Law, Sec. 580, 581.

See,

The Trimble Case,  
The Benevides Case,  
The Rowe Case,  
The McCabe Case,

hereinafter cited.

The meaning of the rule is not only that a treaty must exist with the foreign government for the extradition of a subject, but that *a treaty obligation must exist on the part of the executive of this government* to extradite the citizen, or that Congress or the treaty-making power must by act or treaty have vested the power to extradite in the executive on the facts presented.

### The Trimble Case.

In 1884 the Mexican Government demanded the extradition of Alexander Trimble, a citizen of the United States.

Article I. of the Treaty provided—

“ART. I. It is agreed that the contracting parties shall, on requisition made in their names, \* \* \* deliver up to justice persons who, being accused of the crimes enumerated, \* \* \* shall seek an asylum,” etc.

and last clause of Article VI. provided—

“Neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty.”

12 U. S. Stat. at Large, pp. 1199, 1202.

Mexico claimed that there being a binding agreement to deliver "persons", and "persons" including "citizens", that the last clause clearly indicated that while the governments were not bound to deliver up their own citizens, it was optional with the Executive so to do, and that it should be done in this case.

Mr. Frelinghuysen, then Secretary of State, held that Trimble could not be surrendered. "Setting out with the premise that the Government of the United States is not authorized to deliver up a fugitive from justice in the absence of a treaty or law to that effect, Mr. Frelinghuysen argued that Article VI., since it negated any obligation to surrender the fugitive, left the President with no power to do so. He pointed to the fact that a clause similar to that in Article VI. of the treaty with Mexico was to be found in numerous other extradition treaties of the United States, and that it had always been construed as exempting the citizens of the contracting parties from surrender.

Report of Mr. Frelinghuysen, Sec. of State, to the President, Feb. 13, 1884, S. Ex. Doc. 98, 48 Cong., 1 Sess.

Mr. Frelinghuysen's view is judicially upheld in *Ex Parte McCabe*, 46 Fed. Rep., 363.

See also Mr. Gresham, Sec. of State, to Mr. Romero, Mex. Min., May 22, 1893, MS. Notes to Mexico, IX. 668; Mr. Gresham, Sec. of State, to Mr. Brookes, July 25, 1894, 198 MS. Dom. Let. 85; to U. S. Marshal, July 25, 1894, *id.* 96."

4 Moore Dig. of Int. Law, p. 301.

### **The Benavides Case.**

"In 1893 the President declined to surrender Francisco Benavides, who had been committed for extradition to Mexico on charges of crime in connection with the raid on San Ignacio in December, 1892, on the ground that the evidence showed that he was a citizen of the United States, the treaty providing that the contracting parties should not be bound to deliver up their own citizens.

Mr. Gresham, Sec. of State, to Mr. Romero, Mex. Min., May 13, 1893, MS. Notes to Mex., IX., 664."

4 Moore Int. Law, p. 302.

### **The Rowe Case.**

So, contrawise, in July, 1895, the Mexican Government declined to surrender to the United States Chester W. Rowe, a fugitive from justice, on the ground that he had, by the purchase of real estate in Mexico, assumed Mexican nationality.

See full statement of this case in 4 Moore Int. Law, p. 302.

### **The McCabe Case.**

There appears to be only one judicial decision on this question, namely, that of

*Ex parte McCabe*, 46 Fed., 363 (Dist. Ct. W. D. Texas, 1891).

In that case, which involved the liberty of Mrs. Mary Inez McCabe, a citizen of the United States, who was arrested in Texas for the alleged murder of her husband in Mexico, on a warrant of extradition and *habeas corpus* proceedings in her behalf instituted, MAXEY, J., writes an elaborate opinion in which nearly all the authorities down to date are cited, and calls attention to the fact that the case is one practically of first impression, stating the question as follows, page 369 :

"3. Does the treaty with Mexico authorize the surrender of an American citizen to the Mexican Government for punishment for crime committed within the jurisdiction of that republic?"

and saying :

"It is believed that this precise question has not been determined by any of our courts, state or federal."

And construing the words in the treaty "neither of the contracting parties shall be bound to deliver up its own citizens under the stipulations of this treaty" says :

"The obligation to deliver being denied, upon what can rest the authority? It did not exist in our gov-

ernment, as already shown, independent of treaty engagements, or, if existing as a mere matter of comity or courtesy, there was no lawful mode of enforcing it; and certainly it finds no countenance, either in the Constitution or laws of Congress. The former is silent as to extradition, considered from an international stand-point, and simply confers the general power to make treaties, from which springs the right of the treaty-making power to negotiate with foreign governments for the extradition of fugitives. All the inferences and deductions to be drawn from the statutes would seem clearly to support the view taken by the court; that is, there should be a binding treaty stipulation to authorize the Executive to surrender a fugitive. The first act of Congress on the subject was approved August 12, 1848. Its caption reads: 'An act for giving effect to certain treaty stipulations between this and foreign governments, for the apprehension and delivering up of certain offenders.' 9 St. at Large, 302. Sec. 5270, Rev. St., which is, in substance, the same as the first section of the act of 1848, provides, that, if the officer upon the preliminary hearing deems the evidence sufficient to sustain the charge 'he shall certify the same \* \* \* to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities for the surrender of such person, according to the stipulations of the treaty or convention.' The warrant for surrender does not issue according to the will or discretion of the Executive, but agreeably to the stipulations of the treaty; that is to say, according as the parties have obligated themselves by treaty engagements. If it were otherwise, if the Executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American Constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and

discretion of any official, however lofty his official station. The statute, therefore, employing apt words to confine the warrant of surrender to that class of persons and offenses as to which the parties have entered into binding treaty stipulations, should be held to exclude other classes, and to deny authority or discretion to surrender where the obligation is by treaty expressly denied. *U. S. v. Rauscher, supra*, is referred to in support of this view. While the questions in the two cases are dissimilar, the general principles underlying the case of *Rauscher* have direct application to the case before the court.

*Ex parte McCabe*, 46 Fed., 375.

The Court then goes into the examination of the various treaties and their varying clauses in regard to this matter, on p. 376, and further holds—

“All of our law writers, without an exception, brought to the attention of the court, concur in the opinion that the 6th article of the treaty with Mexico forbids the United States from surrendering their own citizens. Nor is there less uniformity in the practical construction given that article by the Department of State. And such construction by a department of the government charged with the administration of a law, although not binding upon the courts, should properly receive great weight when the law is sought to be judicially construed. The rule should apply with special force to that class of cases where, like the one before the Court, the national chief executive, acting through the State Department, is indued with the ultimate power of withholding the final warrant for surrender of the fugitive. Rev. St. §§ 5270, 5272; *in re Stupp*, 11 Blatch., 125 and note; Spear, Extradition, 245, 246. The proposition asserted is sustained by numerous authorities. Mr. Justice HARLAN, in *U. S. v. Johnson*, clearly states the principle.

46 Fed. Rep., 377.

\* \* \* \* \*

Thus it appears that, extending through a period of seventeen years, 4 different administrations of the



federal government have invariably held that no authority was conferred upon the executive by the sixth article of the treaty, either to demand of the Mexican authorities the extradition of their subjects committing crimes in the United States or to surrender an American citizen upon demand by the Republic of Mexico. Following the construction so consistently applied to the treaty, the executive department, whose appropriate duty it is to execute the treaty pursuant to its stipulations and statutory requirements, has uniformly refused to surrender our own citizens; and it may be well said, if doubt exist as to the true construction of the treaty, which the court freely admits is not entertained in the present case, this contemporaneous and uniform interpretation 'ought to turn the scale.'

46 Fed. Rep., 379.

\* \* \* \* \*

"It is cause for regret that this case cannot reach the Supreme Court, to whose judgment the questions involved should be remitted for final and conclusive determination. But that fact should not deter the trial court from the performance of its duty. If the prisoner be unlawfully restrained of her liberty, an order for her enlargement should be entered without hesitation. Being of opinion, for the reasons given (1) that the warrant issued by the County Judge for the arrest of the petitioner is void; (2) That her surrender is not authorized by the treaty with Mexico—it results that her detention is illegal, and she should therefore be discharged from custody; and it is so ordered."

46 Fed. Rep., 381.

## V.

IT FOLLOWS THAT IN VIEW OF CONSTITUTIONAL IMMUNITIES, IN ORDER THAT A CITIZEN SHOULD BE EXTRADITED THERE MUST EXIST A TREATY OF OBLIGATION TO THAT EFFECT UNDER THE DOCTRINES OF MUNICIPAL AND INTERNATIONAL LAW.

"The obligation to deliver being denied, upon what can rest the authority? It did not exist in our gov-

ernment, as already shown, independent of treaty engagements, or, if existing as a mere matter of comity or courtesy, there was no lawful mode of enforcing it; and certainly it finds no countenance, either in the constitution or laws of Congress. The former is silent as to extradition, considered from an international standpoint, and simply confers the general power to make treaties, from which springs the right of the treaty-making power to negotiate with foreign governments for the extradition of fugitives. All the inferences and deductions to be drawn from the statutes would seem clearly to support the view taken by the court; that is, there should be a binding treaty stipulation to authorize the Executive to surrender the fugitive."

*Ex parte McCabe*, 46 Fed. Rep., 375.

"The warrant for surrender does not issue according to the will or discretion of the Executive, but agreeably to the stipulations of the treaty; that is to say, according as the parties have obligated themselves by treaty engagements. If it were otherwise, if the Executive could at his option and in his discretion transport for trial to a foreign country a person accused of crime, he would in such cases exercise a power which, it is thought, finds no sanction under our constitutional form of government. While nations are not careful to screen criminals seeking an asylum in their midst, personal liberty is so jealously guarded by the American constitution that its safety and security should not be dependent upon the exercise of the arbitrary will and discretion of any official, however lofty his official station. The statute, therefore, employing apt words to confine the warrant of surrender to that class of persons and offenses as to which the parties have entered into binding treaty stipulations, should be held to exclude other classes, and to deny authority or discretion to surrender where the obligation is by treaty expressly denied. *U. S. v. Rauscher*, 119 U. S., 411, 412; 7 Sup. Ct. Rep., 234, is referred to in support of this view. While the questions in the two cases are dissimilar, the

general principles underlying the case of Rauscher have direct application to the case before the Court."

*Ex Parte McCabe*, 46 Fed. Rep., 375.

## VI.

IN THIS CASE WE ARE NOT CONFRONTED BY ANY QUESTION OF A DISCREPANCY OR CONFLICT BETWEEN THE STATUTE AND THE TREATY BECAUSE THE STATUTE IS EXPLICIT TO THE EFFECT THAT IT APPLIES ONLY IN SO FAR AS THE TREATY APPLIES.

Thus the language of Section 5270 of the U. S. Revised Statutes opens as follows :

"§ 5270. Whenever there is a treaty or convention between the Government of the United States and any foreign government", etc.

then a court is authorized, on complaint made, to proceed to extradite as stated.

Again, Section 5274 of the United States Revised Statutes provides as follows :

"SEC. 5274. The provisions of this title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer."

Act, of August 12, 1848, Ch. 167, 9 St. L., 303.

See, 3 Fed. St. Anno., p. 77.

## VII.

HENCE THE RIGHT TO EXTRADITE IN THIS CASE MUST STAND OR FALL UNDER THE TERMS OF THE TREATY, AND IF THE TREATY DOES NOT COVER THE CASE, THE PRISONER MUST GO FREE.

## VIII.

THE TREATY MAKING POWER OF THE UNITED STATES, UNDER SECTION 2, ARTICLE 2, OF THE CONSTITUTION OF THE UNITED STATES, IS LODGED IN THE PRESIDENT OF THE UNITED STATES, BY AND WITH THE ADVICE AND CONSENT OF THE SENATE, IN THE FOLLOWING TERMS :

" He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur ;  
\* \* \*."

Under this power the Italian Extradition Treaties of 1868 and 1885 were made for the texts of these.

See, *supra*, p.

The diplomatic dispute as to the construction of the treaty is set forth in Part III. of this Brief, Part I.

## IX.

WE HAVE CONSISTENTLY MAINTAINED THAT THE ACTION OF THE EXECUTIVE IS THE ACTION OF THE FOREIGN GOVERNMENT.

Dana's Wheaton, § 543, Note 250, citing 1 Kent, 165, Heffter § 84, Vattel, LIV, L. V. ; C. 2 § 14, Halleck 854.

Wharton Digest of Int. Law, § 131, *a* II—20.  
5 Moore's Int. Law Dig., § 759, p. 231.

See our arguments against Spanish Government in case of Mora's claims against Spain.

6 Moore's Dig. of Int. Law, pp. 1017-1021.

Hence the breach by Italy's Executive is proved and admitted.

## X.

ITALY, BY THE PASSAGE OF ITS PENAL CODE OF 1890, CONTAINING IN ART. IX. A PROHIBITION AGAINST THE EXTRADITION OF AN ITALIAN CITIZEN, THEN AND THERE DENOUNCED THE TREATY OF 1868-1884 SO FAR AS IT COULD APPLY TO CITIZENS OF THE ASYLUM COUNTRY.

Article IX. of the Italian Penal Code of 1890 provides as follows :

“ ART. 9. Non e Ammessa l'estradizione del cittadino.”

Codice Penale per il Regno D'Italia.

“ ART. 9. L'Extradition d'un Italien ne peut etre accordes.”

Code Penal Italien. Turnell, Paris, 1890.

“ ART. 9. The extradition of a citizen (*i. e.*, Italian) is not permitted.”

Translation into English.

See Record, page 56, and Defendant's Ex. G.

## XI.

THIS COURT HAS HELD, ON GENERAL PRINCIPLES OF LAW, THAT AN ACT OF CONGRESS SUBSEQUENT IN POINT OF TIME TO A TREATY AND INCONSISTENT WITH ITS PROVISIONS IS A VALID REPEAL OF THE TREATY SO FAR AS CONCERNS OUR MUNICIPAL LAW AND OUR INTERNATIONAL RELATIONS.

The Chinese Exclusion Cases, 130 U. S., 581, 599.

The Chinese Deportation Cases, 149 U. S., 730.

We cannot do less than accord a similar sovereign power to the Legislature of Italy.

## XII.

THE ITALIAN PENAL CODE OF 1890 PROHIBITING IN ARTICLE 9 THE EXTRADITION OF AN ITALIAN CITIZEN IS THEREFORE A REPEALER OF ANY TREATY PROVISION THERETOFORE EXISTING, INCLUDING THE EXTRADITION TREATY WITH THE UNITED STATES OF 1868-1884, IF SUCH TREATY, BY ITS TRUE CONSTRUCTION, COVENANTED TO EXTRADITE AN ITALIAN CITIZEN.

As such it was a valid exercise of their sovereign right—

A. To break the treaty.

B. To denounce it by legislative act.

## XIII.

ASSUMING, THEN, OUR CONSTRUCTION TO BE CORRECT THAT THE TREATY OF 1868 PROVIDED FOR THE EXTRADITION OF CITIZENS IN THE ASYLUM COUNTRY, THE ITALIAN PENAL CODE OF 1890—

A. Repealed it under municipal law ; and

B. Abrogated it under international law.

For—

It is a doctrine of international law that one of the recognized ways of denouncing or abrogating a treaty is to repeal it by legislative enactment.

5 Moore Dig. Int. Law, p. 366, Sec. 776.

We who have exercised the right at least five times,  
(See

French Act of 1798, 5 Moore Int. Law Dig., pp. 356, 357.

The Chinese Exclusion Acts, 130 U. S., 581-599.

The Chinese Deportation Acts, 149 U. S., 698-763.

Eddy *et al.* vs. Robertson, 112 U. S., 580-600.

(The Head Money Tax Cases.)

(The Exchange Case), 7 Cranch, 116, 136)

and who claimed that our act of 1798 repudiating our obligations under the French treaty operated both municipally and internationally, are not in a position to deny a similar power in the Italian sovereignty.

5 Moore Dig. Int. Law, 357.

## XIV.

SO FAR AS ITALY IS CONCERNED, FROM THE TIME OF THE ENACTMENT OF HER PENAL CODE IN 1890, THE EXTRADITION TREATY WITH THE UNITED STATES WAS REPEALED AND ABROGATED SO FAR AS IT CONCERNED CITIZENS OF THE ASYLUM COUNTRIES.

## XV.

AS THE OBLIGATIONS TO EXTRADITE "CITIZENS" IS COVERED BY THE WORD "PERSONS" USED IN A CLAUSE IN WHICH THE IDENTICAL LANGUAGE IS USED TO EXPRESS A RECIPROCAL COVENANT ON THE PART OF EACH GOVERNMENT, THE ABSENCE OR REPUDIATION OF THE OBLIGATION BY ONE GOVERNMENT IP SO FACTO RELEASES THE OTHER GOVERNMENT FROM THE CORRESPONDING TREATY OBLIGATION.

As is well said by this Court :

"When a reciprocal engagement is not carried out by one of the contracting parties, the other may also decline to keep the corresponding engagement."

Chinese Exclusion Cases, 130 U. S., 581, 599, *et seq.*

## XVI.

THE ABROGATION OF THE EXTRADITION TREATY OF 1868 BY ITALY, SO FAR AS IT MIGHT BE CONSTRUED TO COVER CITIZENS OF THE ASYLUM COUNTRIES, RELIEVED THE UNITED STATES GOVERNMENT FROM ALL ITS TREATY OBLIGATIONS TO COMPLY WITH THE TREATY OF 1868.

Any future demand by Italy upon us for extradition of citizens under that treaty is based on the imperfect International obligation of comity alone and not on a treaty obligation, and is made by a country which has already broken its reciprocal obligations and is in no position to claim favorable action as a question either of legal duty or comity.



## XVII.

IT FOLLOWS THAT ON DEMAND MADE BY ITALY UPON US TO EXTRADITE UNDER THE TREATY OF 1868 ONE OF OUR CITIZENS, THIS GOVERNMENT, UNDER THE DOCTRINE OF BOTH MUNICIPAL AND INTERNATIONAL LAW, HAS, AS A SOVEREIGNTY, THE OPTION OR ARBITRARY DISCRETION EITHER TO REFUSE OR TO COMPLY, THERE IS NO LONGER ANY TREATY OBLIGATION.

## XVIII.

ITALY'S BREACH OF THE COVENANT TO EXTRADITE CITIZENS OF THE ASYLUM COUNTRY (THE AMERICAN CONSTRUCTION ASSUMED TO BE THE CORRECT ONE FOR THE PURPOSES OF THIS ARGUMENT) BEING THUS ESTABLISHED, THERE IS NO TREATY OBLIGATION ON THIS SOVEREIGNTY TO SURRENDER. THERE REMAINS UNDER INTERNATIONAL LAW AN OPTION OR ARBITRARY DISCRETION IN THE PREMISES.

## XIX.

IN WHOM RESTS THIS OPTION—THE SOVEREIGNTY CONSISTS OF EXECUTIVE, JUDICIAL AND LEGISLATIVE DEPARTMENTS—IN ALL OR IN WHAT PART OF THESE IS VESTED THIS OPTION ?

## XX.

THE ANSWER IS TO BE FOUND IN THE FORMER ESTABLISHED LAW.

Before any treaty or treaty obligations existed, the rules of international law vested in the sovereignty, not as a matter of obligation, but as a matter of comity, courtesy or option, or arbitrary discretion, the right to extradite.

Thus, Webster says :

A. While it is settled international law at the present time that no international obligation exists in the absence of a treaty for one government to extradite criminals, fugitive from justice, to the offended country, it has always been a doctrine

of international law that, as a matter of comity between nations, such extradition was within the power of the sovereignty.

Mr. Webster, Sec. of State, to Mr. d'Argais, June 21, 1842, Webster's Works VI., 399, 405, cited in 4 Moore Dig. Int. Law, p. 246.

Gould and Tucker, in their Notes on the Revised Statutes of the United States, p. 979, under title "Extradition," say :

"International extradition of fugitives is a matter of comity, and, apart from treaty stipulations, it is the settled policy of this country not to make such extradition. 6 A. G. Op. 85,431; 2 *id.*, 559; 3 *id.*, 661; 2 *id.*, 452,559; 1 *id.*, 509; Holmes's Case, 14 Pet., 593; United States v. Watts, 8 Sawyer, 370; *re* Metzger, 5 How, 176; United States v. Davis, 2 Sumner, 483; *Re* Dos Santos, 2 Brock, 493; *Re* British Prisoners, 1 Wood. & M., 66; *Adriance v. Lagrave*, 59 N. Y., 110; *Re* Washburn, 4 Johns. Ch., 105; 1 Kent. Com., 36; *Com. v. Hawes*, 13 Ky., 697; United States v. Rauscher, 119 U. S., 407; *Benson v. McMahon*, 127 U. S., 457."

B. This power, under international law, is, however, limited in constitutional countries by constitutional limitations of municipal law affecting the department of government.

C. in our early history, before extradition treaties were made, instances have occurred of requests of foreign governments upon us for the extradition of criminals, and it was then consistently held by our publicists that no right existed in the Executive to surrender.

As was said by Mr. Jefferson, Secretary of State, to the President, November 7, 1791, Mss. Department of State,

Quoted in

Moore on Extradition, Vol. 1, p. 22,

and in

4 Moore Dig. Int. Law, p. 246,

"The laws of the United States, like those of England, receive every fugitive, and no authority has been

given our executives to deliver them up," and when, on February 21, 1794, Mr. Fauchet, French Minister to the United States, demanded, by order of the Directory, the arrest, with a view to their transportation to France, of his predecessor, M. Genet, the Secretary of State replied that the President, notwithstanding his disposition to cultivate the friendship of the French Republic, "thinks his legal power too questionable to cause the arrest to be made."

4 Moore Dig. Int. Law, p. 247.

As is said by Wirt, Attorney General, in 1821, 1 Op, 509, 521 :

The President has no power "to make the delivery" unless under treaty or act of Congress.

4 Moore Dig. Int. Law, p. 248.

D. It follows, under the foregoing authorities that where, in the absence of a treaty or act of Congress, an option or arbitrary discretion exists under doctrines of international law to surrender a fugitive from justice, our constitutional limitations prevent that option or arbitrary discretion from being exercised by an executive officer or by a court.

E. We are one of the nations of the world, and, as such, bound by the doctrines of international law.

F. The refusal of our executive to deliver up criminals for extradition, in the absence of a treaty obligation or act of Congress, has been made solely on the ground that the option or arbitrary discretion thus existing under international law was, under our constitutional restrictions, not vested in an executive officer, but solely dependent upon the law making power, either the treaty making power or an act of Congress.

## XXI.

THE SAME REASONING APPLIES WITH EQUAL FORCE TO THE PRESENT CONDITION OF AFFAIRS, WHERE, ALTHOUGH A TREATY ONCE EXISTED, THE ACTION OF THE OTHER PARTY TO THE TREATY IN REPUDIATING THE CONSTRUCTION WE CLAIM, HAS RESULTED IN A BREACH OF THE TREATY OBLIGATION AND A RESULTING OPTION ON THE PART OF THE UNITED STATES GOVERNMENT, EITHER TO RESCIND THE TREATY, OR CLAIM ITS FURTHER ENFORCEMENT BY INTERNATIONAL ARBITRATION.

Under such circumstances, both under municipal and international law, there is from and after such a breach as that made by Italy, no obligation on our part to accede to any demand Italy may make on us for extradition. In other words, it is optional with us whether to extradite.

## XXII.

THE MOMENT THIS OPTION OR ARBITRARY DISCRETION EXISTS, AS IN THE CASE OF NO TREATY, THE CONSTITUTIONAL LIMITATIONS APPLY TO PREVENT THE OPTION FROM BEING EXERCISED BY ANY PORTION OF THE SOVEREIGNTY EXCEPT EITHER THE TREATY MAKING POWER OR CONGRESS.

No such arbitrary power can vest in the executive portion of the sovereignty or in the courts, but must be vested in the treaty-making power or congress, which has the right of determining peace or war.

Just as where no treaty obligation exists there is no power in the executive to exercise the option or arbitrary discretion of extradition under doctrines of international law vested in most sovereignties but prevented in our case by constitutional limitations such as ours, so when, by the act of the foreign government, a treaty has been broken and the similar option or arbitrary discretion exists under international law to extradite or not to extradite, the option, or arbitrary discretion by reason of our constitutional limitations, can not possibly

vest anywhere in the executive or in the courts, but must be referred back to the treaty making power or congress.

Hence, where the option exists under international law of extraditing or not, the arbitrary discretion is not vested in the executive, but only in the treaty making power or congress. For our constitution forbids the exercise by an executive of any such arbitrary powers, and hence there is no power either in the executive or the courts under the circumstances stated.

### XXIII.

UNDER SUCH CIRCUMSTANCES, IN THE ABSENCE OF ACTION BY CONGRESS OR THE TREATY MAKING POWER, THE EXERCISE OF THE OPTION OR ARBITRARY DISCRETION THUS VESTED IN THE SOVEREIGNTY OF THE NATION BY AN EXECUTIVE OFFICER WOULD BE AN EXERCISE OF AN ABSOLUTE DISCRETION AND OF ARBITRARY POWER INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLES OF OUR GOVERNMENT.

For, in its protection of the life and liberty of the citizen, our government has hedged them round with constitutional restrictions, making this a government of laws and not of men.

### XXIV.

UNDOUBTEDLY, IN THE EXECUTIVE, AS REPRESENTING THE SOVEREIGNTY OF THE NATION, MAY BE LODGED BY EXPRESS GRANT FROM THE TREATY MAKING POWER OR CONGRESS SUCH DISCRETIONARY POWER AS PART OF THE EXPRESS TERMS OF AN ACT OR A TREATY MADE UNDER ITS TREATY MAKING POWER, BUT SURELY IN THE ABSENCE OF SUCH AN ENACTMENT NO EXECUTIVE OFFICER CAN BE VESTED BY THE MERE FORCE OF THESE UNTOWARD CIRCUMSTANCES WITH ANY SUCH ARBITRARY POWER UNDER OUR CONSTITUTION.

XXV.

IT FOLLOWS THAT, THERE BEING NO TREATY OBLIGATION TO EXTRADITE ON THE PART OF THIS GOVERNMENT, THERE IS NO JURISDICTION EITHER IN THE EXECUTIVE OR IN THE COURT TO EXTRADITE—

A : UNDER THE STATUTE ; OR

B : UNDER WHAT REMAINS OF THE TREATY.

SO FAR AS CONCERNS AN AMERICAN CITIZEN.

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3

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CLERK.

# Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 232.

PAUL CHARLTON, as the next friend of PORTER CHARLTON,  
*Appellant,*  
*vs.*

JAMES J. KELLY, Sheriff of Hudson County, State of New Jersey,  
and GUSTAVO DE ROSA, Vice-Consul of the Kingdom  
of Italy in the United States of America,  
*Respondents.*

## SUPPLEMENTAL BRIEF FOR APPELLANT.

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**Supreme Court of the United States,**

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**No. 232.**

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**JAMES J. KELLY, Sheriff of Hudson  
County, State of New Jersey, and  
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the Kingdom of Italy in the United  
States of America,  
Respondents.**

**SUPPLEMENTAL BRIEF FOR APPELLANT.**

ON THE BREACH OF A TREATY BY A FOREIGN GOVERNMENT, THE EXECUTIVE HAS THE POWER TO SUSPEND THE OPERATION OF THE TREATY OR REFUSE TO BE BOUND BY IT, OR EVEN TO DENOUNCE IT, AND IS NOT BOUND TO WAIT UNTIL CONGRESS HAS ACTED IN THE PREMISES.

Willoughby says :

"SECTION 223. THE DENUNCIATION OF TREATIES. Though the Senate participates in the ratification of treaties, the President has the authority, without asking for senatorial advice and consent, to denounce an ex-

isting treaty and declare it no longer binding upon the United States."

1 Willoughby on the Constitution, p. 518, Sec. 223.

As the representative of the sovereignty in international relations, the executive, both under international and constitutional law has all the powers of the sovereignty except in so far as the limitations of the constitution prevent.

### A.

#### POWERS IMPLIED IN THE EXECUTIVE.

The question as to the scope of the executive power as distinguished from the power of congress in regard to these matters has arisen chiefly with regard to one branch of the power, namely, the power of the executive to recognize the independence of a new foreign state—a power fraught with the possibilities of war—a branch under this head of the power of the executive similar and analogous to the branch under this head of the power of the executive herein claimed to refuse to be bound by a broken treaty.

It is submitted that both the decisions of this court and the practice of the legislative and executive branches of the government has settled the point that in the executive is vested the power, with or without action by congress, to recognize the independence of a new foreign state.

Such power is based upon the same principles of interpretation of the constitution on which the power now claimed exists.

That such power exists in the executive is sustained by the following cases :

Williams vs. Suffolk Insurance Company, 13 Pet., 415 ; 10 L. Ed., 226.

Gelston vs. Hoyt, 3 Wheat., 246, 324.

The opinion in this latter case, written by Justice STORY uses only the word "government." That he evidently intended by "government" "the executive" appears from the fact that later in deciding—

Williams vs. Suffolk Ins. Co., 3 Sumn., 270, 273, afterwards affirmed by this court in—  
13 Pet., 415,

a case involving executive action only, Justice STORY referred to the former *Gelston* decision as authority for his ruling.

In

*Kenneth vs. Chambers*, 14 How., 30,  
Justice TANEY, in passing on the question of whether Texas was an independent government in September, 1836, said that it "belonged to the government to decide when Texas became independent," and then referred to the President's message of December 22, 1836, as evidence that it had not yet become independent at that time, and says, pp. 50-51 :

"It is a sufficient answer to the argument to say that the question whether Texas had or had not at that time become an independent state was a question for that department of government exclusively which is charged with our foreign relations."

In

*United States vs. Trumbull*, 48 Fed. Rep., 99, 104, referring to the Civil War in Chile, Judge ROSS said :

"It is beyond question that the status of the people composing the congressional party at the time of the commission of the alleged offense is to be regarded by the court as it was then regarded by the political or executive department of the United States. This doctrine is firmly established."

In

*The Itata*, 56 Fed., 505, 510,  
the Circuit Court of Appeals for the Ninth Circuit, speaking through Judge HAWLEY, said :

"The law is well settled that it is the duty of the courts to regard the status of the congressional party in the same light as they were regarded by the executive department of the United States at the time the alleged offenses were committed."

With the exception of a single case,

*United States vs. Palmer*, 3 Wheat., 610, 634,  
where Chief Justice MARSHALL used language applicable to the

legislative as well as to the executive department, wherever this court has referred to the legislative as well to the executive department, the question thus referred to has been one not strictly foreign.

Thus in—

Foster vs. Neilson, 2 Pet., 253, 307.

United States vs. Arredondo, 6 Pet., 691, 711.

and

Garcia vs. Lee, 12 Pet., 511,

the controversy related to the ownership of property within the United States which had formerly, indeed, belonged to Spain, and whose title depended upon the former boundary between the United States and Spain; but the treaties upon which the title in part depended were not self-executing, and the question before the court was really a question of boundary and not of belligerency or independence. The not altogether consistent dicta in—

Jones vs. United States, 137 U. S., 202,

occur in a case where the question at issue was whether certain territory belonged to the United States, and both the President and Congress had acted in asserting sovereignty over a guano island.

The Prize Cases, 2 Black, 635,

although referring to a domestic question, namely, the existence of a great rebellion, involve the power of the executive by a mere proclamation of such facts to affect foreign relations by declaring a blockade against the subjects of foreign nations and under it to forfeit vessels of citizens of foreign countries not obeying the terms thereof, and hence are strictly in point on this question of extensive power of the sovereignty to represent the sovereignty and take action in foreign relations without the action of congress.

Mr. Justice GRIER there says, p. 670 :

“ Whether the President, in fulfilling his duties as a commander in chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this court must be governed by the decisions and acts of the political depart-



ment of the Government, *to which this power was intrusted.*"

The italics are the court's own.

Pomeroy on Constitutional Law, pp. 669, 670, 672, says :

"All foreign relations are thus confided exclusively to the President or to him in connection with the Senate.

\* \* \* \* \*

"Of the unlimited extent and transcendent importance of this function thus confided to the executive, either alone or in connection with the Senate, there can be no doubt.

\* \* \* \* \*

"Congress may pass resolves in relation to questions of an international character ; but these can only have a certain moral weight ; they have no legal effect ; they can not bind the executive. The necessity for this is evident ; negotiations generally require a certain degree of secrecy ; one mind and will must always be more efficient in such matters than a large deliberative assembly.

\* \* \* \* \*

"The President can not declare war ; Congress alone possesses this attribute. But the President may, without any possibility of hindrance from the legislature, so conduct the foreign intercourse, the diplomatic negotiations with other governments as to force a war, as to compel another nation to take the initiative ; and this step once taken the challenge cannot be refused."

Mr. Wharton expresses his opinion in the following head-note : "Such recognition determinable by Executive."

Wharton's Int. Law Dig., 2nd Ed., p. 551.

Those who have argued against the power of the executive alone to recognize a new foreign state have done so on the basis that the power to declare war was in congress and that the recognition might produce a war.

But that this argument has not met the approval either of

this court or the legislative practice of the country is very clearly shown a very remarkable monograph presented by Senator Hale to the United States Senate January 11, 1898, entitled

"Memorandum upon power to recognize the independence of a new foreign state",

Senate Document No. 56, 54th Congress, 2d Session,

Wherein is set forth in exhaustive detail the entire judicial, juridical and legislative learning, practice and precedents on the matter down to that date resulting in the conclusion that the right and power to recognize the independence of a new foreign state is vested under the terms of the constitution in the executive.

Senator Hale in his 6th point states the general principles on which the power then in discussion is founded as follows:

"VI.

"All duties in connection with foreign relations not otherwise specified fall within the sphere of the executive.

The constitution, by its own internal evidence, shows that all duties in connection with foreign relations, not otherwise specified, and this duty especially, are placed upon the executive.

FIRST. The general principle has been already noticed that if a power is confined to one branch of the Government it cannot be presumed to be granted also to one of the other branches of the Government, to be exercised in the same cases and for the same purposes. To make such an assumption would be to deny the wisdom of our forefathers and the homogeneity of their work.

SECOND. It is among the executive powers.

The following powers are expressly granted to the executive branch of the Government. "By and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur," and the President 'shall nominate, and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls,' Congress having no power to alter the method of their appointment; and "he shall receive ambassadors and other public ministers.'

The power to receive public ministers, which is confided in the President alone, implies the power to decide who

should be received. And this implies the power to examine their credentials and ascertain whether the foreign potentates, by whom the credentials are made out, are, in fact sovereigns.

The power to make treaties implies a complete power over diplomatic negotiations. A treaty is an express contract or agreement with a foreign government. All contracts or agreements with foreign governments may be put into the form of treaties, although many of temporary character and minor importance remain in the rank of informal understandings. Diplomatic negotiations are negotiations toward the formation of agreements or contracts, formal or informal. These negotiations are carried on through the Secretary of State, who is appointed by the President, with the advice and consent of the Senate; our public ministers, who are likewise appointed; and the public ministers of other governments, who are received and recognized by the President alone."

\* \* \* \* \*

"The President, therefore, is charged by the Constitution with the drafting of all public treaties, as well as with the conducting of all negotiations leading up to them. These treaties, when they receive the 'advice and consent' of the Senate, become part of 'the supreme law of the land' by Article VI. of the Constitution, and thus come within the provision that the President 'shall take care that the laws be faithfully executed.'

Thus, by ordinary rules of construction of a document of this kind, the President becomes charged with the diplomatic affairs of the United States. All diplomacy, apart from such trivial matters as the exchange of compliments, or procuring of social introductions, consists in the making of international agreements, either temporary, or informal or permanent and formal. The President's power is subject simply to two of the famous 'checks' of the constitution, namely, that he must obtain the ratification of the Senate to the appointment of his diplomatic agents, and to the promulgation of any diplomatic agreement which is intended to be sufficiently formal and permanent in its nature to have the force of law."

Senator Hale in the Senate Document No. 56, 54th Congress, 2d Session, above mentioned, then goes on to prove by the precedents from the Congressional Record that Congress has acquiesced in the construction of the constitution that in

the President is vested the power to recognize the independence of a new foreign state, and cites, among others, the debates in Congress over the various resolutions in regard to the recognition of the South American Republics then in revolt against Spain :

The Panama Mission of 1826.  
 The French Mission of 1832.  
 Relations with France 1835.  
 The 1836 Resolutions as to Texas.  
 The Mission to Mexico of 1842.  
 The Reciprocity Treaty of 1854.  
 The Emperor Maximilian Res., 1864 ; and  
 The Pretoria Resolution, 1876-1877, etc., etc.  
*Id.*, pp. 31 to 52.

for which see the Senate Document, as they are too voluminous to be here cited at length.

In this connection attention should be called to the important precedent that, by executive action alone for many years has been continued the disarmament on the Great Lakes agreed upon between Great Britain and the United States.

The treaty was terminated on notice according to its terms, and executive action alone has continued it ever since.

See 5 Moore on Int. Law, p. 322.

See also the interesting case of

Durand vs. Hollins, 4 Blatchf. 451 ; 8 Fed. Cases No. 4186.

Plaintiff in that case brought an action of trespass to recover damages for the destruction by the defendant of property at Greytown on July 13, 1854. The defendant pleaded that as Commander of a United States ship, the property had been destroyed by him in a bombardment pursuant to an order of the President and Secretary of Navy. On demurrer the plea was sustained.

Judge NELSON said :

" As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him also, the citizens abroad must look for protection of person and of

property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a department of state and a department of the navy.

“ Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence or of threatened violence to the citizen or his property, can not be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action. Under our system of government the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object or the performance of the duty is not worth preserving.”

Durand vs. Hollins, 4 Blatchf., 451; 8 Fed. Cases, p. 111.

Note in this connection that the act of a head of department is in contemplation of law the act of the President.

Wolsey vs. Chapman (1879), 101 U. S., 755; 25 L. Ed., 915.

Wilcox vs. Jackson, 13 Pet. (U. S.), 498, 513.

Runkle vs. U. S. (1887), 122 U. S., 557.

McElrath's Case (1876), 12 Ct. Cl., 202.

Belt's Case (1879), 15 Ct. Cl., 107.

The president has the power, in the absence of legislation by Congress, to control the landing of foreign submarine cables on the shores of the United States.

22 Op. Atty. Gen., 13.

See, also, Cuba-Cables (1899), 22 Op. Atty. Gen., 408, 514.

Again, in the Mexican War, the President, under his executive power and without the action of Congress, took possession of localities and set up temporary governments. Held his action in that respect valid.

Cross vs. Harrison, 16 How., 164.

Referring to the two clauses in the Constitution prescribing that the President "shall receive ambassadors and other public ministers" and the grant of the treaty making power, Black on the Constitution, page 133, says, that the two grants "invest the federal executive with entire control of the foreign relations of the United States," and further says :

"and in this respect the constitution appears to give the President unrestrained authority and consequently unlimited discretion."

The following excellent definition of "due process of law" is given by Tucker :

"Whatever in the regular administration of law in a state is general and impartial in its operation on all persons is due process."

2 Tucker on the Constitution, p. 868, Sec. 390.

## B.

THE EXECUTIVE HAS THE POWER ON THE ADMITTED BREACH OF A TREATY TO REFUSE TO FURTHER ACT UNDER IT, TO SUSPEND ITS OPERATION OR TO DENOUNCE IT.

See the Precedent of the Winslow case

5 Moore Int. Law, p. 319, § 770.

Under the doctrines of International law

"A treaty may be modified is abrogated under the following circumstances \* \* \*

(3) When either party refuses to perform a material stipulation. \* \* \*

5 Moore Int. Law, p. 319, § 770.

Substantially all of the foregoing argument used for the purpose of establishing the power of the executive to recognize new states applies to establish the power of the executive on the admitted breach of a treaty by a foreign nation to refuse to be bound by its terms, to refuse to act under it, to denounce the treaty and to submit the matter to congress for future action in the nature of war or peace, or to the senate for future action with reference to negotiation of a new treaty.

In other words, there must be vested in the executive of the sovereignty of the United States the right and power on the breach of a treaty to exercise the sovereign power of at least refusing to be bound by it, at least until such time as the Legislative Branch of the government can be brought into communication for the purpose of passing on the question.

For this court to hold otherwise as a principle of law would be to leave this government remediless and shorn of its strength as a sovereign nation between the event of the recognized and admitted breach, and the event of calling congress together, either in regular or special session, for the purpose of passing on the question, would be to leave this great sovereignty in a position of absolute helplessness to resent an affront, or to redress a wrong, pending the length of time required for such subsequent action of the legislative bodies. Such a result would make us a laughing stock of the civilized world; as being a sovereignty whose executive, after insult and after affront, is compelled to act as though not insulted and not affronted until some indefinite future time.

In England even the treaty making power is vested in the executive.

If this court should rule that the executive, on the breach of a treaty stipulation, has no power to refuse to be further bound and must continue to act under the treaty after such breach, a corollary would be implied which would result in freeing the prisoner under the facts of this case.

For the possession in the executive of the powers claimed, namely:

1. The right to recognize the independence of a new foreign nation; and
2. The right, on the breach of a treaty, to refuse to act under it, or to denounce it, and to refer the matter of its pros-



ecution by war to congress or by treaty to the senate ; are dependent upon exactly the same grants of power in the constitution and are objected to on identical grounds, namely :

The clauses of the constitution which are relied upon as proving the existence of such a power are the following :

Art. II., Sec. 1, vesting the executive power in the President ;

Art. II., Sec. 2, vesting the treaty making power in the President and Senate ;

Art. II., Sec. 2, vesting the power of appointing ambassadors, etc., in the President and Senate ;

Art. II., Sec. 3, vesting in the President the power "to receive ambassadors and other public ministers," while in each case the argument against the existence of the power in the executive is founded only on the further provision in the constitution vesting in congress the power to make war, etc.

If it is ruled that on the breach of a treaty the executive has no power to suspend its operation or denounce it *at least until such time as Congress or the Senate may act in the premises*, the reason for such refusal of power must be based under the terms of the constitution upon the further grant to congress alone of the power to make war.

It follows that any other implied power in the executive which embraces the important possibilities of war or peace must likewise fail, if war might be the outcome of its existence and operation.

In denying power in the executive under the admitted breach to refuse to act under the treaty, or to denounce it, or rescind its operation even until such time as Congress shall act because of the danger of war arising from the existence of such power, the court must likewise deny to the executive the power, in the first instance, in its diplomatic negotiations with the foreign government to express and insist upon a construction of the treaty contrary to the claim of the foreign government resulting in the same possible danger of war. For the power to make a construction and the insistence on the construction upon which the breach is predicated is likewise an implied power in the executive which must, on the hypothesis, exist only in Congress. For on such a construction depends likewise the grave possibility of war.

For since the power to construe the treaty contrary to the

construction of the foreign nation involves the mighty issues of peace and war arising out of the diplomatic dispute thence arising, and the only reason for denying the power of the executive to cease to act under the treaty on the admitted breach is the argument that to permit the executive so to do without the action of congress might result in unloosing the dogs of war; so likewise there can be no power in the executive, by parity of reasoning, to make the construction of the treaty which results in the same grave issues.

From this situation follows the corollary that since congress has never acted on the question of the construction of the Italian treaty of extradition as it is claimed by the executive department any more than it has acted on the breach of the treaty as it is claimed to exist by the executive department, the executive has acted in excess of its powers in making such a construction—there is no construction of the treaty until Congress has acted—and hence for the purposes of this case, Congress never having acted for over twenty years, the Italian construction, being the only construction left, must be the true construction of the treaty.

Either the Executive of this government has the power of exercising the usual rights of the sovereignty in matters of this description under the true construction of the constitution; or instead of presenting to the world the firm and powerful front of a great nation as represented by a single executive head with full powers in the premises, this government is a mollusc in the family of nations, which, however deep the wound inflicted, has no power in the premises until its legislative assembly has convened and acted.

### C.

IT WILL BE NOTED THAT FOR THE PURPOSES OF THE ARGUMENT IN THIS CASE UNDER THIS HEAD, THE ONLY POWER WHICH NEED BE PROVED TO EXIST IN THE EXECUTIVE IS THE POWER TO REFRAIN FROM ACTING ACCORDING TO THE TERMS OF THE TREATY PRIOR TO THE TIME WHEN CONGRESS CAN MEET AND ACT ON THE BREACH.

There is not involved in the argument for the prisoner in this case any necessity that the executive should have the power of abrogating or denouncing the treaty.

The existence in the executive of the single power to simply suspend the operation of the treaty by refusing to further act under it is all that is required to vest in the executive the arbitrary discretion to act or not to act according to the treaty, which brings the act of the executive in this case in deporting Charlton in conflict with the constitutional prohibition arising from the clause as to due process of law.

Without regard to whether the executive has the right to recognize a foreign new state or not, the executive must have the power, on the admitted breach of a treaty, to refuse to act under it at least until such time as congress may pass upon the question.

Such a power in the executive is so absolutely a necessary part of the powers of the executive of any sovereign government that he who claims the contrary must show some clear provision of the constitution cutting down this proper and necessary power in the executive of any sovereign nation.

No such express or positive limitation exists on such a power in the executive in the constitution.

On the contrary, the grants of power to the executive clearly indicate the possession of the executive of at least this power claimed in this case.

The clauses of the constitution which are relied upon as proving the existence of such a power are the following :

## "ARTICLE II.

SEC. 1: The executive power shall be vested in a President of the United States of America."

## "ARTICLE II., SECTION 2.

The president \* \* \* shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

## "ARTICLE II, SECTION 2.

The president \* \* \* shall nominate, and by and with the advice and consent of the senate, shall ap-

point ambassadors, other public ministers and consuls  
\* \* \*."

"ARTICLE 2, SECTION 3.

He (the president) \* \* \* shall receive ambassadors and other public ministers ;

He shall take care that the laws be faithfully executed."

Under this last clause—"The duty of the president to take care that the laws be faithfully executed is not limited to the enforcement of Acts of Congress or of statutes of the United States according to their expressed terms, but includes the rights, duties and obligations growing out of the constitution itself, *our international relations*, and all the protection implied by the nature of the government under the constitution."

*In re Neagle* (1890), 135 U. S., 64.

In this clause requiring the president to see that the laws shall be faithfully executed is implied the power to denounce a broken treaty in its aspect as a law, as well as a contract ; and to take such steps as may be necessary in connection with such breach to procure by pressure the faithful execution of the treaty short of declaring war, for this latter must be left to Congress.

The quotation of the above extracts from the constitution show clearly that the incidental powers of the President as the executive head of the nation are complete with reference to foreign relations, except in so far as some express provision of the constitution limits them. The last clause cited, vesting the President with the duty to see that the laws are faithfully executed, when applied to laws embraced in treaties, impliedly devolves upon him discretion as to the manner in which he shall enforce execution. This discretion, when applied to a treaty as a law or contract, is one which, from the very nature of the case, requires him, in enforcing its execution, to act in such way as the nature of the case requires. That is to enforce it not by carrying out the law, for this is impossible in the absence of the war power, but by taking such steps as may compel the other government to carry out the law, namely, representations, denunciation and diplomatic

and governmental pressure, to bring about in the only expedient way possible the actual carrying out of the treaty law by the foreign nation. Hence is implied the right to denounce and to refuse to be bound by the foreign nation's action and to refuse to act under the treaty so broken—such steps being the only appropriate means under the circumstances to enforce the views of the executive head of this government as to the meaning and proper carrying out of the law.

It follows that whatever other powers the executive head of this government may or may not have, it is clear that the executive head has the power, on the admitted breach of a treaty, to refuse to be bound by its terms, and to refuse to act under it as a binding obligation, at least until Congress shall have acted or until the matter can be brought to its attention for action.

The existence of this power proves the existence in the executive of the arbitrary discretion to deport or not to deport and the existence of the absence of the obligation to deport on the executive. These conditions bring into operation on the facts of this case the constitutional limitation of "due process of law," preventing the exercise by the executive of this arbitrary discretion so as to deport this citizen.

It follows that the existence of the power of the executive to deport or not to deport being proved, and the existence of the arbitrary discretion in the executive being proved, the petitioner in this case is entitled to the protection of the constitution, and the decision below must be reversed and the prisoner discharged.

Respectfully submitted,

R. FLOYD CLARKE,  
Attorney for Petitioner,  
37 Wall Street,  
New York City.

R. FLOYD CLARKE,  
WILLIAM D. EDWARDS,  
Of Counsel.

Office Supreme Court, U. S.  
FILED.

APR 24 1913

JAMES H. McKENNEY,

CLERK.

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# Supreme Court of the United States.

OCTOBER TERM, 1912.

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No. 232.

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PAUL CHARLTON, as the next friend of PORTER CHARLTON,  
*Appellant,*

*vs.*

JAMES J. KELLY, Sheriff of Hudson County, State of New Jersey,  
and GUSTAVO DE ROSA, Vice-Consul of the Kingdom  
of Italy in the United States of America,  
*Respondents.*

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**Addenda to Record.**

**Opinion of Hon. P. C. Knox, Secretary of State.**

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**Appeal from the Circuit Court of the United States for the  
District of New Jersey.**

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FILED MARCH 2, 1911.

(22,551)





No. 5817.

# United States of America,

## DEPARTMENT OF STATE.

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING :

I certify that the document hereto annexed is a true copy from the files and records of this Department.

IN TESTIMONY WHEREOF I, P. C. KNOX, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my name to be subscribed by the Chief of the Bureau of Citizenship of the said Department, at the City of Washington, this 17th day of January, 1911.

P. C. KNOX,

Secretary of State.

[SEAL]

By R. W. FLOURNOY, JR.,

Chief Bureau of Citizenship.

### **Memorandum—Extradition of Porter Charlton.**

DECEMBER 9, 1910.

On June 24, Porter Charlton was arrested on complaint of the Italian Vice-Consul on a charge of murder committed in Italy. Formal demand for the extradition of Charlton under and pursuant to the terms of the extradition treaty between the United States and Italy was made upon this Government by the Government of Italy under date of July 28 (received by the Department July 30), that is, within the forty day period provided for this purpose in the treaty. Later Charlton was taken before an extradition magistrate who, after a formal

hearing as provided by treaty and statute, committed him on October 14 for surrender to the Italian Government.

The committing magistrate's record as transmitted to the Department discloses no material informality in the proceedings and a case calling for the surrender of the accused under the treaty terms is made out, unless such surrender is to be defeated by objections raised by counsel for the accused. These objections are in their order—

First, that the Secretary of State should decline to surrender the accused and the President should direct his discharge because the record of the committing magistrate as transmitted to the Department does not contain the formal demand of the Italian Government for the surrender of the fugitive, or show that such demand was made within the treaty period; and the Department may not, in passing upon the matter of surrender, take note of the fact that the demand has been made within the proper time and that it is in the Department's files forming a part of the Defendant's record of the case, since the Department may not in passing upon the question take into consideration any evidence not before the committing magistrate.

The formal demand or "requisition" of one Government upon another for the surrender of a fugitive is of a political character. It is made pursuant to and in accordance with treaty provisions, through the regular diplomatic channels, for the performance of the obligations imposed by a treaty. This "requisition" is addressed to the political branch of the one government by the political branch of the other government and is merely notice that the treaty provisions are to be and are thereby invoked in the matter of surrender of fugitives. It would appear, therefore, that the making of a "requisition" is a matter which primarily concerns the political branch of the government, and that all questions regarding the propriety or sufficiency of the form in which it is made are for the determination of that branch.

The statutes of the United States recognize this by conferring upon the committing magistrate jurisdiction to determine whether there are probable grounds to believe that

the accused has committed a crime—such grounds as would justify the placing of the accused on trial if the crime had been committed in this country—whether the crime charged constitutes an extraditable offense, and whether the accused is within the purview of the treaty ; but they leave the question of the sufficiency of the political or diplomatic measures of the proceedings for the determination of the diplomatic branch of the Government.

It is therefore concluded that the first objection raised by the counsel for the accused in this case is without merit and of no effect in defeating extradition.

The second objection is that Charlton should not be surrendered because under the treaty providing that each government shall surrender *persons* fugitive from the one and found in the other, Italy refused to surrender to the United States for trial and punishment Italian subjects who were fugitives from the justice of the United States, therefore the United States is relieved from any obligation to surrender its citizen fugitives from Italy ; and since the Executive may not surrender fugitives to another government except pursuant to the same positive treaty obligation or Congressional act, and there being no such obligation here existing, there is no authority in the Executive to surrender Charlton and he must therefore be discharged.

This contention, like the first, is without merit in this case.

The fundamental fallacy of this contention is that an extradition treaty must be wholly reciprocal. This is not true. Our own treaties will show, for example, that upon occasion we have stipulated for assistance from foreign governments in the matter of the apprehension of criminals fugitive from our justice in other countries where we have not been able to grant and do not grant or extend such assistance in a reciprocal case. Great Britain has concluded a number of treaties in which it is expressly stipulated that Great Britain shall surrender its subjects to the other contracting party, although such party refuses to surrender its subjects in reciprocal cases to Great Britain. The report of the British Commissioner on Extradition made in 1878 recommends that a sound public

policy does not require that British subjects should be exempt from extradition where the demanding government refuses to reciprocate as to its own citizens.

No reason, constitutional or otherwise, is perceived why we should be constrained to take the other view.

The course followed by Italy in the present case indicates, as, indeed, is set forth in the diplomatic correspondence, that the Italian Government regards the United States and Italian extradition treaty as being of this class, that is, non-reciprocal as to citizens or subjects of the respective countries, and that while Italy cannot surrender to the United States for trial and punishment her subjects fugitive from the justice of the United States, still the United States is, pursuant to its own interpretation, under obligation to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy.

The meaning of this treaty with reference to the obligation resting upon the Government of Italy to return to the United States Italian subjects fugitive from the justice of this country has been under discussion for a great many years, the Italian Government at all times during such discussion insisting that since under Italian law it could punish Italians committing crimes in foreign countries and was by that law prohibited from surrendering Italians to such foreign countries for trial and punishment it rested under no obligation under the treaty to surrender Italian subjects to the United States, and the United States contending that the surrender of citizens was imposed upon both countries by the treaty. After discussing the matter for a number of years the United States has so far acquiesced in the Italian construction as generally to cease to make requisition upon the Italian government for the return of Italian citizens to this country for trial and punishment, though never formally announcing its acquiescence in the Italian construction, and on the contrary always insisting, when the question has been raised, upon the soundness and accuracy of its own construction.

The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by

Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word "persons" includes citizens. We are, therefore, committed to that interpretation. The fact that we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us.

In determining the meaning which, as a matter of public morals ought to be given to an extradition treaty, it must be remembered that under our constitution and laws it is not

possible to punish criminals in this country for crimes committed against the peace and dignity of foreign governments, and that, therefore, unless we surrender to such foreign governments, for trial and punishment therein, our citizens committing crimes within the jurisdiction of such government, such citizens will go wholly unwhipped by justice. Extradition treaties are negotiated and put in force and effect in order that persons committing crimes in one country and fleeing to another may be brought to justice, and to interpret an extradition treaty, which under our Constitution is a supreme law of the land, in a way that does violence to its obvious meaning and our consistent contention as to its meaning, so as to produce the precise situation which the treaty was designed to meet and correct cannot be justified.

For these reasons it is decided that the Government of the United States should surrender to the Government of Italy, Porter Charlton, charged with the crime of murder, which crime he has confessed.

Counsel for the prisoner also contends that Charlton should not now be surrendered because the committing magistrate refused to receive testimony tending to prove his insanity. If the magistrate erred in thus refusing such testimony the prisoner has his remedy in the courts, and it is not for the Department, at this stage of the proceedings, to pass upon this question.

(signed) P. C. KNOX.

U. S. Supreme Court, U. S.  
BUILDINGS

MAR 20 1913

JAMES H. McKENNEY

IN THE  
**SUPREME COURT OF THE UNITED STATES.**

No. 532, October Term, 1912.

PAUL CHARLTON, as the next friend of PORTER CHARLTON,

*Appellant,*

vs.

JAMES J. KELLY, Sheriff of Hudson County, State of New Jersey, and GUSTAVO DE ROSA, Vice-Consul of the Kingdom of Italy, in the United States of America,

*Appellee.*

Appeal from the Circuit Court of The United States,  
for the District of New Jersey.

**BRIEF FOR APPELLEE.**

PIERRE P. GARVEN,

*Attorney for Appellee.*

586 Newark Avenue,

Jersey City, N. J.



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# Supreme Court of the United States.

No. 232, OCTOBER TERM, 1912.

PAUL CHARLTON, as the next friend of  
PORTER CHARLTON,  
Appellant,

*v.*

JAMES J. KELLY, Sheriff of Hudson  
County, State of New Jersey, and  
GUSTAVO DE ROSA, Vice-Consul of  
the Kingdom of Italy, in the United  
States of America,  
Appellee.

## BRIEF FOR APPELLEE.

This writ brings up for review the order of the United States Circuit Court, for the District of New Jersey, dismissing a writ of habeas corpus.

### Facts.

We respectfully submit a brief statement of the facts:

Porter Charlton, in whose behalf this proceeding is brought, was charged with the crime of murder, before the Hon. John A. Blair, a Judge of the Court of Oyer and Terminer of the County of Hudson, sitting as a committing Magistrate, under Section 5270 of the United States Revised Statutes.

It is alleged that on or about the seventh day of June, nineteen hundred and ten, at Maltrasio, in the Province of Como, Kingdom of Italy, said Charlton wilfully and feloniously killed his wife, by beating her on the head with a mallet. Shortly after the crime was committed, he sailed from Italy for Hoboken, New Jersey, and on or about the twenty-fourth day of June, nineteen hundred and ten, was apprehended in that City, as he was about to leave the docks of the steamship company. Subsequently, he confessed to the commission of the crime.

There is no point raised in this case, as to the sufficiency of the proof before the Magistrate establishing the commission of the crime and the criminality of Charlton. This is admitted (Record, p. 228).

There are many assignments of error, and I will consider the points of law involved in the order presented in the brief of counsel for the appellant.

## **POINTS OF LAW.**

### **FIRST.**

**The word "persons" includes citizens or subjects of the contracting parties.**

It is contended (Assignment No. 4, Record, p. 185; 13 and 17, Record, p. 194; and 22, Record, p. 196), that the treaty does not apply to a citizen of either country fugitive from the justice of the other in asylum in the country of which he is a citizen or subject. Article 1 of the Treaty of Eighteen Hundred and Sixty-eight (Record, p. 10), provides:

"The Government of the United States and the Government of Italy mutually agree to deliver up *persons*, who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other." The appellant does not contend that this treaty has been abrogated in the manner provided by Article 7 of the Treaty of Eighteen Hundred and Sixty-eight (Record, p. 11), but insists that the Italian Government has heretofore refused the demands of this Government for the extradition of subjects of Italy fugitive from the justice of the United States and found in Italy, principally upon the ground that by the true construction of the treaty, citizens of the asylum country are not included in the word "*persons*," as used in the 1st article thereof. In order to ascertain the real intention of the contracting parties the entire treaty should be examined (*United States v. State of Texas*, 162 U. S., 1-37).

We find in the preamble to the Treaty of Eighteen Hundred and Sixty-eight (Record, p. 9), the two governments "having adjudged it expedient, with a view to the better administration of justice, and to the prevention of crime within their respective territories and jurisdiction, *that persons* convicted of or charged with the crimes hereinafter specified, and being fugitives from justice, should, under certain circumstances, be reciprocally delivered up." This clearly means that *any person* who, charged with crime in one country, shall flee that country and be found in the territory of the other, shall be delivered up to the demanding country. The purpose of treaties of

this character is to prevent criminals who flee from the place where the crime was committed, and seek shelter in foreign territory, from going unpunished. If the contracting parties intended to exclude the citizens and subjects of their respective countries, they would have inserted a clause to that effect. In thirty-one of the thirty-six treaties made by this Government, in which the word "persons" is used, clauses excluding citizens and subjects have been inserted. In passing upon this point in the present case Secretary Knox said: "The fundamental fallacy of this contention is that an extradition treaty must be wholly reciprocal. This is not true. Our own treaties will show, for example, that upon occasion, we have stipulated for assistance from foreign governments in the matter of the apprehension of criminals, fugitive from our justice, in other countries, where we have not been able to grant and do not grant and extend such assistance in a reciprocal case. \* \* \* It should, moreover, be observed, that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and, therefore, the treaty not having been abrogated, its provisions are operative against us. The difficulty would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not, and insists it cannot, surrender its citizens to us. It should be observed, in the first place, that we have always insisted, not only with reference to the Italian extradition treaty, but

with reference to the other extradition treaties, similarly phrased, that the word 'persons' includes citizens. We are, therefore, committed to that interpretation."

Secretary Hay, writing the Governor of Massachusetts, about this very treaty (Record, p. 56), said: "Our extradition treaty with Italy provides for the surrender of 'persons' charged with crime, and no express exemption is made of citizens. This Government has taken the view that where no exception is expressed in the treaty, the obligation to surrender 'persons' includes 'citizens or subjects of the contracting parties.'"

Secretary Blaine, in writing to Baron Fava (Record, p. 69), fully discussed this point. Among other things he said (Record, p. 74): "I do not understand the Italian Government to deny that the provisions of the Treaty of Eighteen Hundred and Sixty-eight, if not obstructed by a municipal statute, or qualified by any principle of international law, would oblige the contracting parties to deliver up their citizens. Indeed, I assume this to be admitted. The treaty says that the two governments mutually agree to deliver up the 'persons who, having been convicted or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territory of the other.' As the term, 'persons' comprehends citizens, and as the treaty contains no qualifications of that term, it is necessary to assume that the treaty, standing alone, would require the extradition by the contracting parties, of their citizens or subjects. I shall also assume it to be admitted by the Italian Government, that the parties to a



treaty are not permitted to abridge their duty under it by a municipal statute. It is true that the authorities of a country, may, by reason of such statute, find themselves deprived of the power to execute a treaty. But if, in obeying a statute, they fail or refuse to fulfill the treaty, the other party may justly complain that its rights are disregarded and may consider the convention as at an end. Hence, in appealing to its statutes to justify its action in the present case, I understand the position of the Italian Government to be that those statutes are merely declaratory of the law by which nations are bound to be governed in their dealings with one another.

"From what has been said, I am forced to conclude not only that international law does not except citizens from surrender, but also that it has been well understood, especially in dealing with the United States, that the term 'persons' includes citizens and requires their extradition unless they are expressly exempted."

It is insisted, therefore, that when the two governments entered into this agreement "with a view to the better administration of justice, and to the prevention of crimes" they thereby intended the treaty to apply to all persons committing crimes in one country and seeking an asylum in the other.

## SECOND.

**No error in holding that this Government, under the provisions of the treaty, has the right to surrender the person charged with crime.**

The power or authority of this Government to

deport Charlton, rests absolutely upon the provisions of the treaty. That an extradition treaty between the two governments involved, did exist, is admitted, but it is contended (Assignments No. 3, 5, 8, 12, 14, 15, 16, 17, 18, 19, 23, 24, 25 and 26) that the action of the Italian Government in enacting in the Penal Code (Record, p. 110) a provision that "The extradition of citizens is forbidden;" that its refusal since that time to surrender Italian subjects charged with the commission of crime here; the abandonment by this country of further efforts to obtain extradition in such cases and the diplomatic correspondence which, it is alleged, shows a breach of the duty, prevents this country from surrendering its citizens. The 7th article of the treaty provides (Rec., p. 11) : "This convention shall continue in force during five years from the day of exchange of ratifications, but if neither party shall have given to the other six months' previous notice of its intention to terminate the same, the convention shall remain in force five years longer, and so on." It is practically conceded that this treaty has not been abrogated in the manner set forth in this article and we insist, therefore, its provisions are binding and remain operative against us. If either government was dissatisfied with the action of the other, and desired the treaty to end, a six months' notice of an intention to terminate it would have been given. Under this treaty, requests have been made by one party or the other for the extradition of persons charged with crime, and this of itself, clearly indicates an intention to keep alive this convention. The American Government has always considered this treaty as existing, but it is insisted that the conduct of the Italian Government, in forbidding the extra-

dition of its citizens and its refusal to grant the requests of this Government to deliver citizens charged with the commission of crime, makes it no longer obligatory on this Government and the convention is at an end. This is not a question of construction but of the existence of the treaty, and is not a matter of judicial cognizance. Rellstab, J., in dealing with this point, said (Rec., p. 180) : "It is said that the refusal by Italy to surrender its subjects, is such a breach of a reciprocal duty as to prevent the American Government from surrendering its citizens. It seems to me that that proceeds upon a false reasoning. In the case of an ordinary contract, it is not held that because one of the parties violates its terms, the other may not insist upon its being maintained. He has the option of considering the contract at an end, and taking such steps to enforce his right as he deems best. That is also the option of the United States Government, but which department of the Government? Manifestly the political department—Congress or the treaty making power; possibly the executive power within certain limitations—assuredly not the judiciary. How can it be said that a court may declare a treaty made between the United States and a foreign sovereign, abrogated, when the political department of the Government are considering it as subsisting? That, it will be observed, is not a question of construction, but of the existence of the agreement."

The Italian Government passed an act prohibiting the extradition of its citizens, and as a result, it is claimed, whatever obligations rested upon this Government have become dissolved. The validity of this so-called legislative release is not a matter for the judiciary, and the question whether this

Government is justified in recognizing its obligations under the treaty, is not for the Court to determine. *Chae Chan Ping v. United States*, 130 U. S., 581-602.

In that case Justice Fields said: "This subject was fully considered by Mr. Justice Curtiss, whilst sitting in the Circuit, in *Taylor v. Morton*, 2 Curtiss, 454-459, and he held that whilst it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty, the power to do so was a prerogative of which no nation could be deprived without deeply affecting its independence; but whether the treaty with a foreign sovereign had been violated by him; whether the consideration of a particular stipulation of a treaty had been voluntarily withdrawn by one party so as to no longer be obligatory upon the other, and whether the views and acts of a foreign sovereign, manifested through its representative, had given just occasion to the political department of our Government to withhold the execution of the terms contained in a treaty or to act in direct contravention to such terms, were not judicial questions; that the power to determine them has not been confided to the judiciary, which has no suitable means to execute it, but to the executive and legislative departments of the Government; and that it belongs to diplomacy and legislation and to the administration of existing laws." In the present case, a situation arises where it is alleged a foreign government has violated the stipulations of a treaty, and as a result, there is no longer an obligation upon the other to recognize such treaty.

The case above cited (*Chae Chan Ping v. U. S.*, *supra*), disposes of the right of the appellant in this Court to raise questions of this character,

and, as the only basis for denying the existence of the treaty is the act of the Italian Parliament excluding the extradition of its citizens, we respectfully insist that, conceding the inhibition pronounced by the Italian Government as paramount in law as the treaty itself, nevertheless, this Government has the right to consider the treaty still existing, and deliver over, upon demand of the Italian Government, the person charged with the commission of a crime within the territory of that country.

This Government has always recognized the existence of the treaty, and, through its proper representative, has agreed to deliver up the defendant. Conceding that Italy has violated the treaty stipulations, that is a matter to be dealt with by the political department of our Government. The act of the Italian Government, giving it the strongest construction, would only operate to make the treaty voidable, and not void, and this Government being the injured party, has the right to waive the infraction or declare the treaty to be at an end. There is nothing in the record to indicate that the political department of this Government has ever done anything to abrogate the treaty, and until it is abrogated or denounced, an absolute duty rests upon the proper executive officers to comply strictly with the terms of the treaty.

In *Terlinder v. Ames*, 184 U. S., 270-287, Chief Justice Fuller referred to a decision of Justice Blatchford, in which the latter Justice said (*In re Thomas*, 12 Blatchf., 370): "Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not abso-

lutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture" (1 Kent Com., 174).

### THIRD.

#### **The offer of evidence to prove insanity properly excluded.**

The seventh, twentieth and twenty-first assignments of error refer to the exclusion of evidence, which it is alleged tends to show Charlton insane. This offer is found on page 99 of the printed record. The offer, however, was not made until the close of the case on the part of the Italian Government, and a refusal to dismiss the proceedings. Then, in explaining to the Magistrate what evidence they proposed to interpose as a defense, Charlton's counsel said (Record, p. 47): "In addition to this, we propose to show as a reason why the extradition should not be granted, that on the date of the day of the commission of the crime in Italy, the prisoner, Porter Charlton, was of unsound mind, to such an extent that he was unable to distinguish between the right and wrong of the deed for which he has been committed; in other words, that under our law, he was insane and continued in that condition of mind up to the time of his arrest."

From this statement of counsel their purpose in offering this evidence is disclosed, namely—to prove that Charlton was insane, not at the time of hearing, but at the time of the commission of the crime and his arrest. Such evidence must be considered as a defense (*State v. Graves*, 16 Vroom,

347-359), and under the law of New Jersey, which controls the practice in this hearing, a defense is not permissible. Article 1 of the Treaty of Eighteen Hundred and Sixty-eight provides (Record, p. 10) that a person shall be delivered up when "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension or commitment for trial if the crime had been there committed."

We are, therefore, confronted with two questions:

First. What is meant by the laws of the place where the fugitive or person so charged shall be found?

Second. What evidence of criminality under those laws would justify his apprehension and commitment for trial?

Counsel for the appellant admits in the record that under the New Jersey law, evidence of insanity cannot be heard at a preliminary hearing of one accused of murder (Record, p. 101). In the case of *Wright v. Henkel*, 190 U. S., 40-57, Chief Justice Fuller said: "In July, 1884, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that 'Cases as they occur, necessarily depend upon the laws of the several states in which the fugitive may be arrested or found,' and in December of that year Mr. Calhoun wrote to the French Minister, 'What evidence is necessary to authorize an arrest and commitment depends upon the laws of the *state or place* where the criminal may be found.'"

The identical words used in this treaty, however, have been passed upon by this Court in the



case of *Pettit v. Walshe*, 194 U. S., 205. Mr. Justice Harlan, in delivering the opinion, among other things, said: "The words of the Tenth Article of the Treaty of Eighteen Hundred and Forty-two 'as according to the laws of the place where the fugitive or the person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed,' and the words 'punishable by the laws of both countries,' in the Treaty of Eighteen Hundred and Eighty-nine, standing alone might be considered as referring to this country as a unit, as it exists under the Constitution of the United States, and as there are no common law crimes of the United States, and as the crime of murder is not known to the National Government except in places over which it may exercise exclusive jurisdiction, the better construction of the treaty is that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that state of the union in which he is arrested."

What evidence of criminality would justify defendant's apprehension and commitment for trial, under our New Jersey laws?

Justice Miller in the case of *Benson v. McMahon*, 127 U. S., 457, in referring to the proceedings before a Commissioner, said: "It is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing Magistrate, for the purpose of determining whether a case is made out

which would justify the holding of the accused either by imprisonment or under bail, to ultimately answer to the indictment or other proceedings in which he shall be finally tried upon the charge made against him."

Under the common law, the defendant had no right to be heard at his trial, and his right to testify in New Jersey is given to him under Section Fifty-seven of the Criminal Procedure Act, Laws of Eighteen Hundred and Ninety-eight, page 886, which provides that "upon the trial of any indictment the defendant shall be admitted to testify if he shall offer himself as a witness."

Under the Constitution of the United States and also of the State of New Jersey, he has no right to be heard at a preliminary hearing. His rights at such hearing are governed by the common law and Section Seventeen of the Criminal Procedure Act of New Jersey, Laws of Eighteen Hundred and Ninety-eight, page 871.

Blackstone (Cooley's Edition, Vol. 2, p. 459), referring to the preliminary hearing of a prisoner charged with crime, says: "The Justice before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged, and to this end, by Statutes Two and Three, P. and M., C. 10, he is to take in writing the examination of such prisoner and the information of those who bring him."

Under the common law, it was mandatory on the part of the Justice to take examination of the prisoner in writing. That was the law under which preliminary hearings were conducted in New Jersey until the adoption of what is now Section Seventeen of the Criminal Procedure Act aforesaid. Under that section, a Judge or Magis-

trate before whom a prisoner charged with murder shall be brought, shall, when in his judgment the ends of justice so require, before he commit or send the accused to prison, take in writing the examination of the accused, and information of those who bring him, of the facts and circumstances thereof. Whether he shall take the statement of the accused is a matter of discretion, and the only witnesses permitted to testify, are those who know the facts or circumstances of the particular crime charged. In this case, the attorney for the appellee made no objection to a statement by the defendant (Record, p. 105). We respectfully insist that the Magistrate was justified in excluding evidence of that character.

#### **FOURTH.**

##### **No error in admission of the demand.**

The 5th specification of error relied upon, refers to the admission of the demand. There is no error in this admission. It will be seen upon a reading of the testimony, that counsel for the appellant offered in evidence a certified copy of this identical demand. A reference to the evidence will disclose the situation. The appellant served upon the Secretary of State a writ of certiorari requiring a return of all records relating to the proceeding before the committing Magistrate (Record, pp. 138 and 198). In response to this writ, the Secretary made a return. Counsel for appellant had, previous to this time, written the Secretary to forward the formal demand made by the Italian Government. In answer to that request, the Secretary sent the formal demand di-

rectly to the Clerk of the Circuit Court (Record, p. 145), and upon the return of the writ of habeas corpus, appellant's counsel moved to strike this demand from the record (Record, p. 145). The ground of the objection was that the Secretary had not properly certified the same (Record, p. 199). This request was granted. Then counsel for appellee obtained a writ of certiorari to bring this demand before the Court. Subsequently it was offered and received in evidence (Record, p. 290). Then counsel for appellant offered in evidence the identical demand which he, theretofore, had stricken from the record (Record, p. 200), and in addition thereto, offered correspondence between the Secretary of State and himself (Record, p. 170), relating to the demand. This correspondence was voluntarily offered by the petitioner (Record, p. 200), and in it we find that a formal demand was made by the Italian Government, giving also the time it was filed. Under these circumstances, we contend that the objection is without merit.

#### **FIFTH.**

**All requirements of the treaty relating to the formal demand were strictly complied with.**

The Italian Government instituted the extradition proceedings under Section 5270 of the United States Revised Statutes. It was lawful for them to proceed in this way. In *Castro v. De Uriarte*, 63 Fed. Rep., 93, Brown, J., said: "But the mere fact that a treaty provides a mode for carrying out its provisions, in the absence of legislation, cannot make it incompetent

for Congress to pass laws in aid of the treaty, and in order to facilitate the extradition of criminals, to dispense with a part of those preliminaries, which otherwise it might be necessary for the foreign government to resort to. \* \* \* Congress has in fact, provided, that, 'Whenever there is a treaty or convention for extradition' certain proceedings may be had, and this law is without regard to the particular proceedings of the various treaties and requires no previous executive mandate. \* \* \* In effect, under our law, two proceedings are available to demanding governments: one according to the provisions of the treaty alone and the other under the Revised Statutes as well, and as long as the provisions of neither are repugnant to the other. \* \* \* It is at the option of the demanding government to pursue either."

*Grin v. Shine*, 187 U. S., 180-189.

Under Section 5270, "whenever there is a treaty \* \* \* for extradition between the Government of the United States and any foreign government, \* \* \* any \* \* \* Judge of a court of record \* \* \* may, upon complaint made, under oath, charging any person found within the limits of any state, with having committed, within the jurisdiction of any such foreign government, any of the crimes provided for by such treaty, or convention, issue his warrant." In this case, we have a complaint charging a crime committed in a foreign country (Record, p. 20); a warrant to apprehend the fugitive (Record, p. 22); an admission by counsel for appellant (Record, p. 228), that the evidence before the Magistrate "was sufficient *prima facie* to estab-

lish the commission of such crime and the criminality" of the defendant, and the certificate of the Magistrate, certifying the facts and submitting all the testimony taken in the case to the Secretary of State (Record, p. 31). This is a strict compliance with the terms of the statute. The appellant, however, objects to the demand, and such objections are included in the 4th and 6th specifications of errors. They refer principally to the legality of the demand, the date of filing and the documents accompanying them.

This Court should not be called upon to pass on the question whether a demand was filed within forty days, either with the Magistrate or the Secretary of State. Under the treaty, the demand is to be made to the representatives of the respective countries (Record, pp. 11 and 13), and the Magistrate has no concern as to what transpires between the two countries. The defendant in bringing his record before the Court purposely confined the review to the record of the case before the Magistrate. If he desired to question the demand, it was his duty to bring up for review the entire record of the proceedings including the records of the Secretary of State. This he failed to do, and we insist, therefore, that he should be precluded from questioning the legality of the proceedings before the Secretary of State.

Article 2 of the Treaty of Eighteen Hundred and Eighty-four provides (Record, p. 13), "if, however, the requisition, together with the documents above provided for, shall not be made as required, by the diplomatic representative of the demanding government, or, in his absence, by a consular officer thereof, within forty days of the date of the arrest of the accused, the prisoner shall be set at liberty."

It is somewhat difficult to determine what is meant by the words, "the requisition," therefore, the article should be read in connection with Article 5 of the Treaty of Eighteen Hundred and Sixty-eight. Under Article 5, the requisition evidently refers to the preliminary arrest. Under Article 2 of the Treaty of Eighteen Hundred and Eighty-four, I am inclined to believe it refers to the formal demand. If it refers to the requisition for the preliminary arrest, then the record before the Magistrate shows conclusively that it was filed on July eighth, nineteen hundred and ten, within forty days of the arrest of the accused (Record, pp. 33-40-65). If this Court holds that the filing of the formal demand with the Secretary of State is a matter for its consideration, then the record returned by the Secretary of State (Record, pp. 149 and 201), shows that the demand was filed by a proper representative of the Italian Government on July thirteenth, nineteen hundred and ten, which brings it within the required forty days.

It is insisted that no documents accompanied the requisition as provided in the second paragraph of Article 5, as amended and supplemented by the Treaty of Eighteen Hundred and Eighty-four. It is also difficult to determine what is meant by the words "together with the documents above provided for," but, taking all the documents mentioned in both sections of the treaty, the record shows strict compliance with the terms thereof. Article 5 (Record, p. 11), of the original Treaty of Eighteen Hundred and Sixty-eight, refers to a requisition for the surrender of a fugitive from justice, and when "the fugitive shall have been merely charged with



crime, a duly authenticated copy of the warrant for his arrest, in the country where the crime may have been committed, or of the depositions upon which the warrant may have been issued, must accompany the requisition as aforesaid."

That brings us to the question as to what documents, under the Treaty of Eighteen Hundred and Eighty-four, should be filed as stated above. Article 2 of that treaty refers to a certificate signed by the Secretary of State, attesting that a requisition has been made to secure the preliminary arrest of a person charged with crime. This preliminary requisition is not the requisition referred to in the proviso, for the former must be made before the arrest of the accused, while the latter is to be made within forty days from the date of the arrest. This action also refers to a complaint, a warrant and formal demand for extradition of the person charged; such demand to be supported by evidence. The method of procedure prescribed in this section of the treaty was not followed in this case, but the record shows a complaint, a warrant and a formal demand. This demand, with the record of the proceedings conducted by the authorities in Italy, and authenticated by the Embassy of the United States at Rome, was filed with the Secretary of State (Record, p. 201). If the Court should hold that the words "together with the documents above provided for" refers to the evidence in support of the demand, we respectfully insist that the defendant should not be permitted to profit by his own acts. He was apprehended on June twenty-fourth, nineteen hundred and ten, and on the twenty-eighth of that month, he was brought into Court (Record, p. 33), and the Italian Govern-

ment was prepared to go on with the hearing, but on the request of counsel for the defendant the hearing was adjourned to July eighth. On that day, counsel for defendant again asked for an adjournment (Record, p. 33), and the hearing was put over till August eleventh. At that time the Italian Government was again ready to proceed (Case, p. 34), but the case was adjourned to September twenty-first, nineteen hundred and ten, at which time evidence was given in the case and shortly thereafter a certified copy of the testimony filed with the Secretary of State.

So, too, appellant complains that the communication dated July twenty-eighth, nineteen hundred and ten, is not the demand required by the treaty, but is merely a request. This communication was filed in strict compliance with the stipulation of the treaty. In it the Italian Government formally asked for the extradition of Charlton. The fact that they use the word "request" rather than the word "demand" does not change the nature of the document.

### **SIXTH.**

**For the reasons stated the judgment should be affirmed.**

Respectfully submitted,

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N. J.

CHARLTON v. KELLY, SHERIFF OF HUDSON  
COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF NEW JERSEY.

No. 232. Argued April 18, 1913.—Decided June 10, 1913.

The rule that a writ of *habeas corpus* cannot be used as a writ of error applies to extradition proceedings; and if the committing magistrate had jurisdiction and there was competent evidence as to commission of the crime his decision may not be reviewed on *habeas corpus*.

The accused in an extradition proceeding has not the right to introduce evidence simply because it would be admissible on the trial on plea of not guilty, nor is this right given by § 3 of the act of August 3, 1882. Section 3 of the act of August 3, 1882, does not make evidence relevant, legal or competent which would not theretofore have been competent on a proceeding in extradition.

The proceeding in extradition before the examining magistrate is not a trial, and the issue is not the actual guilt, but whether there is a *prima facie* case sufficient to hold the accused for trial.

There is not, nor can there be, a uniform rule as to admission of evidence for the accused in an extradition proceeding.

An examining magistrate may exclude evidence as to insanity of the accused; such evidence is in the nature of defense and should be heard at the trial or on preliminary examination in the jurisdiction of the crime.

Construing the supplementary treaty of extradition with Italy of 1884

in the light of the original treaty of 1882 and of § 5270, Rev. Stat., it is not obligatory thereunder that the formal demand should be proven in preliminary proceedings within forty days after the arrest. In this case it appears that every requirement of the law, whether treaty or statute was substantially complied with.

The word "persons" etymologically considered includes citizens as well as those who are not; and while it is the practice of a preponderant number of nations to refuse to deliver its own citizens under a treaty of extradition silent on the point specifically, *held*, in view of the diplomatic history of the United States, there is no principle of international law by which citizens are excepted from the operation of a treaty to surrender persons where no such exception is made in the treaty itself. The United States has always so construed its treaties.

The construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is of great weight. While a violation of the extradition treaties with Italy of 1882 and 1884 by that power might render the treaty denounceable by the United States, it does not render it void and of no effect; and so *held* that the refusal of Italy to surrender its nationals has not had the effect of abrogating the treaty but of merely placing the Government in the position of having the right to denounce it.

A government can waive violations of a treaty by the other party, and it remains in force until formally abrogated.

Where, as in this case, the Executive has elected to waive any right to free itself from the obligation to deliver its own citizens under an existing extradition treaty, it is the duty of the court to recognize the obligation to surrender a citizen thereunder as one imposed by the treaty as the supreme law of the land.

185 Fed. Rep. 880, affirmed.

THIS is an appeal from a judgment dismissing a petition for a writ of *habeas corpus* and remanding the petitioner to custody under a warrant for his extradition as a fugitive from the justice of the Kingdom of Italy.

The proceedings for the extradition of the appellant were begun upon a complaint duly made by the Italian Vice-Consul, charging him with the commission of a murder in Italy. A warrant was duly issued by the Hon. John A. Blair, one of the judges of New Jersey,

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qualified to sit as a committing magistrate in such a proceeding, under § 5270, Rev. Stat. At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice and that he was the person whose return to Italy was desired, and that there was probable cause for holding him for trial upon the charge of murder, committed there. He thereupon committed the appellant, to be held until surrendered under a warrant to be issued by the Secretary of State. A transcript of the evidence and of the findings was duly certified as required by § 5270, Rev. Stat., and a warrant in due form for his surrender was issued by the Secretary of State. Its execution has, up to this time, been prevented by the *habeas corpus* proceedings in the court below and the pendency of this appeal.

The procedure in an extradition proceeding is that found in the treaty under which the extradition is demanded, and the legislation by Congress in aid thereof. Thus, Article I of the treaty with Italy of March 23, 1868 (vol. 1, Treaties, Conventions, etc., of the United States, 1910, p. 966), reads as follows (p. 967):

"The Government of the United States and the Government of Italy mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other: Provided, that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed."

One of the crimes specified in the section following, is murder.

By Article V it is provided, that:

"When, however, the fugitive shall have been merely

charged with crime, a duly authenticated copy of the warrant for his arrest in the country where the crime may have been committed, or of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid. The President of the United States, or the proper executive authority in Italy, may then issue a warrant for the apprehension of the fugitive, in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases."

That article was amended by the additional treaty of June 11, 1884 (vol. 1, *Treaties and Conventions*, pp. 985, 986), by a clause added in these words:

"Any competent judicial magistrate of either of the two countries shall be authorized after the exhibition of a certificate signed by the Minister of Foreign Affairs [of Italy] or the Secretary of State [of the United States] attesting that a requisition has been made by the Government of the other country to secure the preliminary arrest of a person condemned for or charged with having therein committed a crime for which, pursuant to this Convention, extradition may be granted, and on complaint duly made under oath by a person cognizant of the fact, or by a diplomatic or consular officer of the demanding Government, being duly authorized by the latter, and attesting that the aforesaid crime was thus perpetrated, to issue a warrant for the arrest of the person thus inculpated, to the end that he or she may be brought before the said magistrate, so that the evidence of his or her criminality may be heard and considered; and the person thus accused and imprisoned shall from time to time be remanded to prison until a formal demand for his or her extradition shall be made and supported by evidence as above provided; if, however, the requisition, together with the documents

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above provided for, shall not be made, as required, by the diplomatic representative of the demanding Government, or, in his absence, by a consular officer thereof, within forty days from the date of the arrest of the accused, the prisoner shall be set at liberty."

*Mr. R. Floyd Clarke*, with whom *Mr. William D. Edwards* was on the brief, for appellant:

The admitted breach of the treaty presents a question of law and not of diplomacy, as to the respective rights of the Executive and citizen.

On such admitted breach the question is judicial not diplomatic and the judiciary are not foreclosed by the diplomatic construction to the contrary. *United States v. Rauscher*, 119 U. S. 407; *Chin Low v. United States*, 208 U. S. 8; *Wilson v. Wall*, 6 Wall. 83, 89; *In re Cooper*, 143 U. S. 472, 499; *The La Ninfa*, 75 Fed. Rep. 513; 44 U. S. App. 648.

In the absence of a statute or treaty, there is no power in the Executive to extradite criminals under the imperfect obligation of international law. 4 Moore on Int. Law, §§ 580-581; citing numerous cases.

It is not sufficient for a treaty to exist. Under this rule there must be a legal obligation under the treaty to extradite before the Executive can act.

Where the treaty provides that the contracting parties are not bound to deliver citizens, the Executive has no power to deport a citizen. Cases *supra* and *The Trimble Case*, 1 Moore on Ext., § 35, p. 167; 4 Moore on Int. Law, §§ 580 *et seq.*; *The Benevides Case*, 4 Moore's Int. Law, p. 302; *The Row Case, Id.*; *Ex parte McCabe*, 46 Fed. Rep. 363.

The treaty, if "persons" is to be construed as a covenant to surrender citizens of the asylum country, has been broken by Italy by the passage of the Italian Penal Code prohibiting the extradition of Italian citizens. Treaties



may be broken by inconsistent legislative action. *The Chinese Exclusion Cases*, 130 U. S. 581, 599; *The Chinese Deportation Cases*, 149 U. S. 730; 5 Moore's Dig. Int. Law, p. 366, § 776.

We have exercised the right at least five times. See French Act of 1798, 5 Moore's Dig. Int. Law, pp. 356, 357; *Chinese Exclusion Cases*, 130 U. S. 581, 599; *Chinese Deportation Cases*, 149 U. S. 698, 763; *Edye v. Robertson*, 112 U. S. 580, 600 (*Head Money Tax Cases*); *The Exchange Case*, 7 Cranch, 116, 136; 5 Moore's Dig. Int. Law, 357.

Italy has also broken the treaty by inconsistent executive action in refusing to surrender Italian citizens.

A sovereignty is bound in its international relations by the action of its executive independent of its legislative powers. *The Prize Cases*, 2 Black, 635; Dana's Wheaton, § 543, note 250, citing 1 Kent, 165; Heffter, § 84, Vattel, LIV, LV, c. 2, § 14; Wharton's Dig. Int. Law, § 131, a 11-20; 5 Moore's Dig. Int. Law, § 759, p. 231; 6 Id., p. 1017; Halleck, 854. See arguments of United States in *Mora's Case against Spain*, 6 Moore's Dig. Int. Law, 1017.

Italy's breach of the covenant to extradite citizens of the asylum country (the American construction assumed to be the correct one for the purpose of this argument) being thus established, there is no treaty obligation on this sovereignty to surrender. There remains under international law an option or arbitrary discretion in the premises. As to who has the option—the sovereignty consisting of executive, judicial and legislative departments—the question is whether in all or in what part of these is vested this option.

Italy having broken her entire and reciprocal covenant in this treaty, the sovereignty of the United States has the option to rescind the treaty for breach; and to insist upon Italy's compliance therewith; this can be done by

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war, by arbitration or by acquiescence in the Italian construction.

The Executive cannot exercise the option of affirming by either war or arbitration but it can affirm the treaty, or can disaffirm it, to the extent of refusing Italy's demand as such action does not violate the constitutional rights of anyone.

The Executive has no power of affirmance by deporting a citizen in the absence of congressional authority.

The Executive has full power to suspend the treaty by reason of the alleged breach until the action of Congress. *The Winslow Case*, U. S. For. Rel. 1876, pp. 204-309; For. Rel. 1877, 271-289; 5 Moore's Int. Law, pp. 321, 322; *United States v. Rauscher*, 119 U. S. 407; *The Prize Cases*, 2 Black, 635, 699.

See, also, 1 Willoughby on the Constitution, p. 223, § 518; *Williams v. Suffolk Ins. Co.*, 13 Pet. 415; *Gelston v. Hoyt*, 3 Wheat. 246, 324; *Kenneth v. Chambers*, 14 How. 30; *United States v. Trumbull*, 48 Fed. Rep. 99, 104; *The Itata*, 56 Fed. Rep. 505, 510; *The Prize Cases*, 2 Black, 635, 670; Pomeroy on Constitutional Law, §§ 669, 670, 672.

As to the power to recognize the independence of a new foreign state, see Sen. Doc. No. 56, 54th Cong., 2d Sess.

See also precedent of the extension of the disarmament on the Great Lakes between Great Britain and the United States, 5 Moore on Int. Law, p. 322; *Cross v. Harrison*, 16 How. 164.

The act of a head of a department is in contemplation of law the act of the President. *Wolsey v. Chapman* (1879), 101 U. S. 755; *Wilcox v. Jackson*, 13 Pet. 498, 513; *Runkle v. United States* (1887), 122 U. S. 557; *McElrath's Case* (1876), 12 Ct. Cl. 202; *Bell's Case* (1879), 15 Ct. Cl. 107.

The constitutional limitation of due process of law prevents the exercise by the Executive of the arbitrary

discretion so as to deport the citizen. For meaning of due process of law see *Davidson v. New Orleans*, 96 U. S. 97; *Giozza v. Tiernan*, 148 U. S. 657; *Ekiu v. United States*, 142 U. S. 651; *United States v. Ju Toy*, 198 U. S. 253; *Chin Low v. United States*, 208 U. S. 8; *Yick Wo v. Hopkins*, 118 U. S. 356.

These cases show the strength of the "due process of law" clause even as against a discretionary power expressly and properly granted by Congress under the circumstances arising in the matter.

The claim of the Government that the treaty, though broken as a contract, exists as a law binding on the Secretary, cannot be sustained.

The objection is likewise against reason in that although a treaty is a municipal law as well as an international contract, it cannot when broken be any more binding on the nation or the executive head of the nation having this discretion, as a law, than it can be as a contract.

As to the Government's position that appellant's argument assumes that the breach by Italy has abrogated the treaty so far as concerns this government, no such claim is made.

The Executive, under the facts of this case, cannot affirm this Italian treaty in view of its admitted breach, by deporting an American citizen, because in so doing he exercises an arbitrary discretion resting in him to extradite or not to extradite under the circumstances. To allow the Executive to so act is contrary to the constitutional provision protecting a citizen from the exercise by executive officers of such arbitrary discretion, and allowing his "life, liberty and property" to be only affected by "the law of the land."

The demand in this case is not a demand under the treaty, but a demand under international law.

When, in matters of this character, the treaty or statute requires some act to be done based on the presence or

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absence of certain formal documents, the existence of such formal documents is jurisdictional—without them the case falls. See *Tucker v. Alexandroff*, 183 U. S. 424; *Compton v. Alabama*, 214 U. S. 46. Questions of this kind are of law for this court and are not political.

The material part of this formal demand reads as follows:

“Manchester, Mass., July 28, 1910.

Mr. Secretary of State:

Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have the honor to lay before your Excellency a formal request for the extradition of Porter Charlton,” etc.

“Montagliari.”

By thus referring to former communications, it is seen that Italy refers to communications in which she states that she does not retreat from her position that the word “persons” does not include citizens of the asylum country, and thus knowing Charlton is a citizen of the asylum country she is asking for the extradition on the basis of the power this government has to grant it, but refuses to be bound by any construction of the treaty to the effect that she shall surrender her own citizens.

This word “request” is chosen with nice precision to characterize a request under international comity which this request is, but is the wrong term if, under the facts of this case and the former dispute, rights are claimed by Italy under the treaty.

The form of demand used in this case, a formal untruth as a demand under the treaty and in substance a request under international comity, should not be allowed by this court as the “formal demand” required by the treaty.

Since the right of a citizen is involved and the facts admitted, this is not a question to be foreclosed by the

fiat of the diplomatic construction. *United States v. Rauscher*, 119 U. S. 407.

It follows that the formal request in this case is of no more effect—not being of the *bona fide* kind required by the treaty under the circumstances—than if none had been made.

*Mr. Pierre P. Garven* for appellees.

MR. JUSTICE LURTON, after making the foregoing statement, delivered the opinion of the court.

A writ of *habeas corpus* cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject-matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which, according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that State, his decision may not be reviewed on *habeas corpus*. *Terlinden v. Ames*, 184 U. S. 270, 278; *Bryant v. United States*, 167 U. S. 104; *McNamara v. Henkel*, 226 U. S. 520.

By a stipulation filed in the case for the purpose of this review, it is agreed that the evidence presented to Judge Blair of the murder with which the accused was charged, and of his criminality was sufficient to meet the treaty and statutory requirements of the case, and the errors assigned in this court questioning its legality and competency, as well as those as to the alleged absence of a warrant or deposition upon which such warrant was issued, have been withdrawn. But neither this stipulation, nor the withdrawal of the assignments of error referred to is to affect any of the matters raised by other objections pointed out in other assignments.

The objections which are relied upon for the purpose of

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defeating extradition may be conveniently summarized and considered under four heads:

1. That evidence of the insanity of the accused was offered and excluded.

2. That the evidence of a formal demand for the extradition of the accused was not filed until more than forty days after the arrest.

3. That appellant is a citizen of the United States, and that the treaty in providing for the extradition of "persons" accused of crime does not include persons who are citizens or subjects of the nation upon whom the demand is made.

4. That if the word "person" as used in the treaty includes citizens of the asylum country, the treaty, in so far as it covers that subject, has been abrogated by the conduct of Italy in refusing to deliver up its own citizens upon the demand of the United States, and by the enactment of a municipal law, since the treaty, forbidding the extradition of citizens.

We will consider these objections in their order:

1. Was evidence of insanity improperly excluded?

It must be conceded that impressive evidence of the insanity of the accused was offered by him and excluded. It is now said that this ruling was erroneous. But if so, this is not a writ of error and mere errors in the rejection of evidence are not subject to review by a writ of *habeas corpus*. *Benson v. McMahon*, 127 U. S. 457, 461; *Terlinden v. Ames*, 184 U. S. 270, 278; *McNamara v. Henkel*, *supra*. In the *McNamara Case*, certain depositions had been received for the prosecution over objection. This court said that there was legal evidence on which to base the action of the commissioner in holding the accused for extradition, irrespective of the depositions objected to.

But it is said that the act of August 3, 1882, 22 Statutes,

215, c. 378, § 3, requires that the defendant's witnesses shall be heard. That section is most inartificially drawn. It reads as follows:

"That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States."

The contention is that the effect of this provision is to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. To this we cannot agree. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. True, the statute speaks of evidence "material for his defense, without which he cannot safely go to trial," but we cannot discover that Congress intended to depart from the provisions of Article I of the treaty which requires that a surrender shall be made "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment, if the crime had been there committed." The provision is common to many treaties, and Congress, by § 5270, Rev. Stat., has, in aid



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of such treaties, prescribed the procedure upon such a hearing in these words:

"Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Judge Blair made the certificate in form and substance in conformity with the statute, and upon the receipt of that, a warrant was duly issued for the surrender of the appellant to the agents of the Italian Government.

In *Benson v. McMahon*, *supra* (p. 462) this court said of a similar provision in the treaty with Mexico, in connection with Rev. Stat. § 5270

"Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that

the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. The language of the treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.' This prescribes the proceedings in these preliminary examinations as accurately as language can well do it. The act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged.

"We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the act of Congress, and the treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody to await the requisition of the Mexican government."

To repeat, the act of 1882 does not prescribe the extent

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to which evidence thus obtained shall be admitted, and we quite agree with the view expressed by Judge Brown, in *In re Wadge*, 15 Fed. Rep. 864, who said (p. 866):

"The phrase in § 3 of the act of August 3, 1882 'that he, (the accused) cannot safely go to trial without them,' (witnesses,) cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice, viz, such as is appropriate to a hearing having reference only to a commitment for future trial."

There is not and cannot well be any uniform rule determining how far an examining magistrate should hear the witnesses produced by an accused person. The proceeding is not a trial. The issue is confined to the single question of whether the evidence for the State makes a *prima facie* case of guilt sufficient to make it proper to hold the party for trial. Such committing trials, if they may be called trials in any legal sense, are usually regulated by local statutes. Neither can the courts be expected to bring about uniformity of practice as to the right of such an accused person to have his witnesses examined, since if they are heard, that is the end of the matter, as the ruling cannot be reversed.

In this case the magistrate refused to hear evidence of insanity. It is claimed that because he excluded such evidence, the judgment committing appellant for extradition is to be set aside as a nullity, and the accused set at liberty. At most the exclusion was error not reviewable by *habeas corpus*. To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the witnesses for the Government. This distinction was taken by Mr. Justice Washington in the case of *United States v. White*, 2 Washington C. C. 29, when he said:

"Generally speaking, the defendant's witnesses are not examined upon an application to bind him over to answer upon a criminal charge. The defendant's witnesses are never sent to the grand jury, except where the attorney for the prosecution consents thereto. But in this incipient stage of the prosecution, the judge may examine witnesses who were present at the time when the offence is said to have been committed, to explain what is said by the witnesses for the prosecution; and the cross-examination of the witnesses for the prosecution, is certainly improper."

We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. If the evidence was only for the purpose of showing present insanity by reason of which the accused was not capable of defending the charge of crime, it is an objection which should be taken before or at the time of his trial for the crime, and heard by the court having jurisdiction of the crime. If it was offered to show insanity at the time of the commission of the crime, it was obviously a defense which should be heard at the time of his trial, or by a preliminary hearing in the jurisdiction of the crime, if so provided for by its laws. By the law of New Jersey, insanity as an excuse for crime is a defense, and the burden of making it out is upon the defendant. *Graves v. State*, 45 N. J. L. 347; *State v. Maioni*, 78 N. J. L. 339, 341; *State v. Peacock*, 50 N. J. L. 34, 36. A defendant has no general right to have evidence exonerating him go before a grand jury, and unless the prosecution consents, such witnesses may be excluded: 1 Chitty Crim. Law, 318; *United States v. White*, *supra*; *Respublica v. Shaffer*, 1 Dallas, 236, 255; *United States v. Palmer*, 2 Cranch Circuit Court, 11; *United States v. Terry*, 39 Fed. Rep. 355, 362.

2. It is next objected that no formal demand for the extradition of the appellant was made within forty days after his arrest, and that he was therefore entitled to be

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set at liberty. The objection is founded upon the supplemental convention with Italy of 1884, heretofore set out.

A "certificate," such as was indicated by that convention, was undoubtedly "exhibited" to the committing magistrate, and was the basis of his action. The other parts of the provision are not clear. What is referred to by the phrase, "the requisition, together with the documents above provided," etc., which is required to be made within forty days, or the person set at liberty? The "certificate" attesting "that a requisition has been made," etc., was "exhibited" to Judge Blair; and we fail to find in this clause of the treaty any requirement that the subsequent "formal demand" for the extradition shall be filed with the magistrate within forty days after the arrest of the accused, or at any other time. The whole of the convention should be read together and in connection with § 5270, Rev. Stat., which is applicable to all treaties. Under § 5270 any one of the judicial officers named therein, may, upon complaint, charging one of the crimes named in the treaty, issue his warrant of arrest and hear the evidence of criminality. This done, his duty is, if he deems the evidence sufficient to hold the accused for extradition, to commit him to jail, and to certify his conclusion, with the evidence, to the Secretary of State, who may then, "upon the requisition of the proper authorities of such foreign government, issue his warrant for the surrender of the accused." Rev. Stat., §§ 5272, 5273. Of course, the effect of the supplementary treaty of 1884, being later than the statutory requirements above referred to, is to supersede the statute in so far as there is a necessary conflict in the carrying out of the extradition obligation between this country and Italy. But, as observed in *Grin v. Shine*, 187 U. S. 181, 191, "Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare

that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. DeUriarte*, 16 Fed. Rep. 93. This appears to have been the object of § 5270, which is applicable to all foreign governments with which we have treaties of extradition." This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." Had there been no law of Congress upon the subject, the method of procedure prescribed by the supplementary treaty of 1884 would necessarily have been the proper one, and the committing magistrate could have proceeded only according to the treaty, for that would have been the only law of the land applicable to the case and the only source of his authority.

It was therefore competent for Judge Blair to act upon the complaint made before him independently of any preliminary mandate or certificate, such as was in fact issued and "exhibited" to him in this case, being plainly authorized so to do by the terms of § 5270. The personal rights of the accused are saved by the provisions of the same section, since he could only have been surrendered upon the warrant of the Secretary of State, based upon the evidence presented upon the hearing, and the conclusion of the sufficiency of the evidence of criminality certified to the Secretary of State, and upon a formal requisition for extradition. *Castro v. DeUriarte*, 16 Fed. Rep. 93, 97; *Grin v. Shine*, *supra*.

Construed in the light of the original and supplementary conventions with Italy and of § 5270, Rev. Stat., we do not find that it was obligatory that the "formal demand" referred to in the 1884 clause should be proven in the preliminary proceeding within forty days after the arrest. That is a demand made upon the executive authority of the United States by the executive authority of Italy. Its presentation was not necessary to give the examining magistrate jurisdiction. Such a formal demand

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was in fact made on July 28, 1910, less than forty days after the arrest. That, together with the certificate of the magistrate and the evidence submitted to him, was the authority of law under which the Secretary of State issued his warrant of extradition. Every requirement of the law, whether it appears in the treaty or in the act of Congress, was substantially complied with. This was the construction placed upon the treaty by Mr. Secretary Knox in answer to the same objection made to him before he issued his warrant, and also of Judge Rellstab, who dismissed the petition for a writ of *habeas corpus* and from whose decree this appeal comes.

3. By Article I of the extradition treaty with Italy the two governments mutually agree to deliver up all persons, who, having been convicted of or charged with any of the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum in the other, etc. It is claimed by counsel for the appellant that the word "persons" as used in this article does not include persons who are citizens of the asylum country.

That the word "persons" etymologically includes citizens as well as those who are not, can hardly be debatable. The treaty contains no reservation of citizens of the country of asylum. The contention is that an express exclusion of citizens or subjects is not necessary, as by implication, from accepted principles of public law, persons who are citizens of the asylum country are excluded from extradition conventions unless expressly included. This was the position taken by the Foreign Minister of Italy in a correspondence in 1890 with the Secretary of State of the United States, concerning a demand made by the United States for the extradition of Bevivini and Villella, two subjects of Italy whose extradition was sought, that they might be tried for a crime committed in this country. Their extradition was refused



by Italy on account of their Italian nationality. The Foreign Minister of Italy advanced in favor of the Italian position these grounds: (a) That the Italian Penal Code of 1890, in express terms provided that, "the extradition of a citizen is not permitted;" (b) That a crime committed by an Italian subject in a foreign country was punishable in Italy, and, therefore, there was no ground for saying that unless extradited the crime would go unpunished; and (c) That it has become a recognized principle of public international law that one nation will not deliver its own citizens or subjects upon the demand of another, to be tried for a crime committed in the territory of the latter, unless it has entered into a convention expressly so contracting, and that the United States had itself recognized the principle in many treaties by inserting a clause exempting citizens from extradition. (United States Foreign Relations 1890, p. 555.) Mr. Blaine, then Secretary of State of the United States, protested against the position of the Italian government and maintained the view that citizens were included among the persons subject to extradition unless expressly excluded. His defense of the position is full and remarkably able. It is to be found in United States Foreign Relations for 1890, pp. 557, 566.

We shall pass by the effect of the Penal Code in preventing the authorities of Italy from carrying out its international engagements to surrender citizens, for that has no bearing upon the question now under consideration, which is, whether under accepted principles of international law, citizens are to be regarded as not embraced within an extradition treaty unless expressly included. That it has come to be the practice with a preponderant number of nations to refuse to deliver its citizens, is true; but this exception is convincingly shown by Mr. Blaine in his reply to the Foreign Minister of Italy and by the thorough consideration of the whole subject by Mr. John

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Bassett Moore, in his treatise on extradition, ch. V, pp. 152, 193, to be of modern origin. The beginning of the exemption is traced to the practice between France and the Low Countries in the eighteenth century. Owing to the existence in the municipal law of many nations of provisions prohibiting the extradition of citizens, the United States has in several of its extradition treaties clauses exempting citizens from their obligation. The treaties in force in 1910 may, therefore, be divided into two classes, those which expressly exempt citizens, and those which do not. Those which do contain the limitation are by far the larger number. Among the treaties which provide for the extradition of "persons," without limitation or qualification are the following:

With Great Britain, August 9, 1842, extended July 12, 1889, United States Treaties, 1910, pp. 650 and 740.

With France, November 9, 1843, *supra*, p. 526.

With Italy, February 8, 1868, *supra*, p. 961.

With Venezuela, August 27, 1860, *supra*, p. 1845.

With Ecuador, June 28, 1872, *supra*, p. 436.

With Dominican Republic, February 8, 1867, *supra*, p. 403.

The treaty with Japan of April 29, 1886, *supra*, p. 1025, contains a qualification in these words:

"Art. VII. Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so."

The conclusion we reach is, that there is no principle of international law by which citizens are excepted out of an agreement to surrender "persons," where no such exception is made in the treaty itself. Upon the contrary, the word "persons" includes *all* persons when not qualified as it is in some of the treaties between this and other nations. That this country has made such an exception in some of

its conventions and not in others, demonstrates that the contracting parties were fully aware of the consequences unless there was a clause qualifying the word "persons." This interpretation has been consistently upheld by the United States, and enforced under the several treaties which do not exempt citizens. That Italy has not conformed to this view, and the effect of this attitude will be considered later. But that the United States has always construed its obligation as embracing its citizens is illustrated by the action of the executive branch of the Government in this very instance. A construction of a treaty by the political department of the Government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight.

The subject is summed up by Mr. John Bassett Moore in his work on extradition, vol. 1, p. 170, § 138, where he says:

" 'Persons' includes citizens. In respect to the persons to be surrendered, the extradition treaties of the United States all employ the general term 'persons,' or 'all persons.' Hence, where no express exception is made, the treaties warrant no distinction as to nationality. Writing on the general subject of the extradition treaties of the United States and the practice thereunder, Mr. Seward said: 'In some of the United States' extradition treaties it is stipulated that the citizens or subjects of the parties shall not be surrendered. Where there is no express reservation of the kind, there would not, it is presumed, be any hesitation in giving up a citizen of the United States to be tried abroad.' Such has been the uniform and unquestioned practice under the treaty with Great Britain of 1842, in which the term 'all persons' is used."

The effect of yielding to the interpretation urged by Italy would have brought about most serious consequences as to other treaties then in force. One of these was the extradition treaty with Great Britain made as far back as

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1843. Inasmuch as under the law of that country, as of this, crimes committed by their citizens within the jurisdiction of another country were punishable only where the crime was committed, it was important that the Italian interpretation should not be accepted.

4. We come now to the contention that by the refusal of Italy to deliver up fugitives of Italian nationality, the treaty has thereby ceased to be of obligation on the United States. The attitude of Italy is indicated by its Penal Code of 1900 which forbids the extradition of citizens, and by the denial in two or more instances to recognize this obligation of the treaty as extending to its citizens.

During a preliminary correspondence between the Department of State and the Italian Chargé d'Affaires, in reference to the provisional arrest and detention of the appellant under articles I and II of the treaty, as extended by article II of the additional convention of 1884, Mr. Knox, the then Secretary of State, inquired, "whether or not the Department is to understand that by initiating extradition proceedings for the surrender of this American citizen accused of committing murder in Italy, your Government wishes to be understood as surrendering its view heretofore entertained and as being now willing to adopt as to cases which may hereafter arise between the two Governments, the view that the Extradition Treaties of eighteen sixty-eight, eighteen sixty-nine and eighteen eighty-four between the United States and Italy require the surrender by each Government of any and all persons, irrespective of the nationality, who having been convicted for or charged with commission of any of the crimes specified in the treaty within the jurisdiction of one of the contracting parties shall seek an asylum or be found within the territory of the other, and further and specifically to inquire whether the Government of Italy now proposes as to all cases arising in the future to deliver to the Government of the United States under and in accordance with

the Treaty provisions those Italian subjects who committing crimes in the United States take refuge in Italy."

The reply to this was as follows:

"July 1, 1910.

"MR. SECRETARY OF STATE: By telegram of June 24, last, your Excellency inquired whether in instituting extradition proceedings in the case of Porter Charlton, who confessed having committed murder at Moltrasio, the King's Government intended to depart from the rule, heretofore observed, not to surrender its own subjects and whether it was to be inferred that Italians guilty of an offense committed on American territory, who should take refuge in Italy, should hereafter be delivered without fail to the American Government.

"I now have the honor to inform your Excellency that the King's Government cannot depart from the principle established by our law that our nationals cannot be surrendered to foreign powers. Furthermore, this principle does not conflict with the provisions of the Extradition Convention. Indeed it seems logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation.

"The Italian law does not consent to the extradition of nationals, but the Italian courts are competent to try on the request of a foreign Government, their nationals who may have committed offenses on that Government's Territory.

"Contrariwise, the laws of the United States by not permitting local tribunals to try American citizens for offenses committed abroad seem to admit of their being extradited. Otherwise an offender would, under theegis of the law itself, escape the punishment he deserves.

"I have the honor to inform your Excellency that the requisite extradition papers in the case of Porter Charlton

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will be forwarded to me without delay and in the meanwhile I beg you kindly to cause the prisoner to be held in provisional detention."

On July 28, 1910, the following communication was addressed to the Secretary of State, and was received on July 30, 1910:

"MR. SECRETARY OF STATE: Referring to previous communications and in accordance with the provisions of Article V of the Extradition Convention of March 23, 1868, I have honor to lay before your Excellency a formal request for the extradition of Porter Charlton who has confessed the crime of murder committed on the person of his own wife at Moltrasio, Como, which crime is specified in Article II, Section 1 of the said Convention.

"Your Excellency has already been so good as to forward to me, in note No. 864 of June 28 last, the preliminary certificate of arrest provided by Article II of the Additional Convention of June 11, 1884, with a view to the provisional arrest of the above named accused.

"In support of this request, I have the honor to transmit herewith to Your Excellency the record of proceedings conducted by the Court of Como in the case of the aforesaid murder. The papers are regularly visæd by the Embassy of the United States at Rome.

"Awaiting the Federal 'warrant' and the kind return of the enclosed papers for submission to the competent court, I avail myself of this opportunity to renew to Your Excellency, together with my thanks in advance, the assurance of my highest consideration."

To this the Secretary of State, after the conclusion of the hearing before Judge Blair and the receipt by the Department of his judgment and the evidence produced before him, replied as follows:

"WASHINGTON, December 10, 1910.

"EXCELLENCY: In compliance with the request made by your Embassy in its note of July 28 last, and in pursu-

ance of existing treaty stipulations between the United States and Italy, I have the honor to enclose a warrant of surrender in the case of Porter Charlton, charged with murder committed within the jurisdiction of the Kingdom of Italy, and examined and committed for surrender by the Honorable John A. Blair, Judge of the Court of Common Pleas in and for the County of Hudson, in the State of New Jersey.

"Accept, Excellency, the renewed assurance of my highest consideration."

The attitude of the Italian Government indicated by proffering this request for extradition "in accordance with Article V of the Treaty of 1868," is, as shown by the communication of July 1st set out above, substantially this,—

First. That crimes committed by an American in a foreign country were not justiciable in the United States, and must, therefore, go unpunished unless the accused be delivered to the country wherein the crime was committed for trial.

Second: Such was not the case with Italy, since under the laws of Italy, crimes committed by its subjects in foreign lands were justiciable in Italy.

Third: That as a consequence of the difference in the municipal law, "it was logical that so far as parity in the matter of extraditing their respective citizens or subjects is concerned, each party should, in the absence of specific provisions in the Convention itself, be guided by the spirit of its own legislation."

This adherence to a view of the obligation of the treaty as not requiring one country to surrender its nationals while it did the other, presented a situation in which the United States might do either of two things, namely: abandon its own interpretation of the word "persons" as including citizens, or adhere to its own interpretation and surrender the appellant, although the obligation had,



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as to nationals, ceased to be reciprocal. The United States could not yield its own interpretation of the treaty, since that would have had the most serious consequence on five other treaties in which the word "persons" had been used in its ordinary meaning, as including *all persons*, and, therefore, not exempting citizens. If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. 1 Kent's Comm., p. 175.

Upon this subject Vattel, page \*452, says:

"When the treaty of peace is violated by one of the contracting parties, the other has the option of either declaring the treaty null and void, or allowing it still to subsist; for a contract which contains reciprocal engagements, cannot be binding on him with respect to the party who on his side pays no regard to the same contract. But, if he chooses not to come to a rupture, the treaty remains valid and obligatory."

Grotius says (book 3, ch. 20, par. 38):

"It is honourable, and laudable to maintain a peace even after it has been violated by the other parties: as Scipio did, after the many treacherous acts of the Carthaginians. For no one can release himself from an obligation by acting contrary to his engagements. And though it may be further said that the peace is broken by such an act, yet the breach ought to be taken in favour of the innocent party, if he thinks proper to avail himself of it."

In Moore's International Law Digest, Vol. 5, page 566, it is said:

"A treaty is primarily a compact between independent nations, and depends for the enforcement of its provisions on the honor and the interests of the governments which are parties to it. If these fail, its infraction becomes the subject of international reclamation and negotiation, which may lead to war to enforce them. With this judicial tribunals have nothing to do."

In the case of *In re Thomas*, 12 Blatchf. 370, Mr. Justice Blatchford (then District Judge) said:

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture."

In the case of *Terlinden v. Ames*, 184 U. S. 270, 287, the question was presented whether a treaty was a legal obligation if the state with whom it was made was without power to carry out its obligation. This court quoted with approval the language of Justice Blatchford, set out above, and said (p. 285):

"And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance."

That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. In the memorandum giving the rea-

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sons of the Department of State for determining to surrender the appellant, after stating the difference between the two governments as to the interpretation of this clause of the treaty, Mr. Secretary Knox said:

"The question is now for the first time presented as to whether or not the United States is under obligation under treaty to surrender to Italy for trial and punishment citizens of the United States fugitive from the justice of Italy, notwithstanding the interpretation placed upon the treaty by Italy with reference to Italian subjects. In this connection it should be observed that the United States, although, as stated above, consistently contending that the Italian interpretation was not the proper one, has not treated the Italian practice as a breach of the treaty obligation necessarily requiring abrogation, has not abrogated the treaty or taken any step looking thereto, and has, on the contrary, constantly regarded the treaty as in full force and effect and has answered the obligations imposed thereby and has invoked the rights therein granted. It should, moreover, be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us.

"The question would, therefore, appear to reduce itself to one of interpretation of the meaning of the treaty, the Government of the United States being now for the first time called upon to declare whether it regards the treaty as obliging it to surrender its citizens to Italy, notwithstanding Italy has not and insists it can not surrender its citizens to us. It should be observed, in the first place, that we have always insisted not only with reference to the Italian extradition treaty, but with reference to the other extradition treaties similarly phrased that the word 'persons' includes citizens. We are, therefore, committed to that interpretation. The fact that

we have for reasons already given ceased generally to make requisition upon the Government of Italy for the surrender of Italian subjects under the treaty, would not require of necessity that we should, as a matter of logic or law, regard ourselves as free from the obligation of surrendering our citizens, we laboring under no such legal inhibition regarding surrender as operates against the government of Italy. Therefore, since extradition treaties need not be reciprocal, even in the matter of the surrendering of citizens, it would seem entirely sound to consider ourselves as bound to surrender our citizens to Italy even though Italy should not, by reason of the provisions of her municipal law be able to surrender its citizens to us."

The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land and as affording authority for the warrant of extradition.

*Judgment affirmed.*

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